

EXHIBIT A

From: "Desiree Golen"

To: tgolen@aol.com, "Golen, Thomas"

Cc:

Bcc:

Date: Mon, 6 Oct 2008 14:42:55 -0700

Subject: iPhone App

Hey dad. I'm trying to get a company started to make a MultiPlayer game similar to Tetris for the iPhone.

The market for iPhone games has exploded ever since apple opened its doors to outside developers (the apple Standard Developers Kit which is used to program iPhones, iPods, Mac OS, etc. is now free and available to anyone on the apple website).

I've met with Wayne Westerman, the man who invented the touch screen and the accelerometer interfaces for the iPhone and is Steve Job's right hand man. (Coincidentally he is Michael's sister's boyfriend). He gave me some inside advice, telling me the time to get games out is now.

The appstore is the platform from which these games run. Heres how it works: If you own an iPhone, you access iTunes either on your phone or on you mac. You browse through the different applications that are for sale (apple maintains "whats hot", "top ten paid app" and "top ten free app" sections.), click on one, and it appears on your phone. Its simple and goes straight to your bill. Meanwhile, apple takes a 30% cut out of profits, and sends the game owner a check.

What this means is easy marketing for developers and a direct means of reaping what you sow. Generally, gaming programmers have to jump through hoops to advertise and expose their games. They work on building a community (which is a long and pricey process that usually involves giving your product away for free) and subsequently either 1) opt to sell their company or 2) run advertisements and make money this way. Only after this process do they see any return.

With the Appstore, independent developers name the price, and the product goes directly to the user.

Why apple does this: it wants to attract attention, it wants the iPhone to have snazzy games that appear magically, and it wants to take a significant chunck of the earnings.

60 days after the release of the SDK, the sale of a developers license (\$100 for independents and \$300 for large companies), and the opening of the appstore, apple hit its 1Million download marker! No doubt because iPhone users define themselves as technically sophisticated, are on average under 30 years of age, and are financially stable. They are the products of the email/internet HERE and NOW generation. They like easy, smooth, features, and they download and use an average of 10 apps per month.

Case 3:09-cv-06115-FJW-DFA Document 35-3 Filed 04/21/11 Page 3 of 82 PageID 234
Simple games like Trism (<http://blog.wired.com/gadgets/2008/09/indie-developer.html>), 2 Across (<http://arstechnica.com/journals/apple.ars/2008/08/04/app-store-bringing-in-strong-revenue-for-some-iphone-devs>), air hockey, and racing games made by private developers have made 250K each in 2 months! (This is after the 30% cut, after paying back start-up costs, and after paying for the SDK/Developers license).

Large companies have also released games, but have paid less attention to detail. The current Tetris game (which has about 1000 customer reviews, meaning that over 165,000 users have downloaded the app) has only a 2.5 rating out of 5. Customers complain about bugs and the game crashing. (The only reported perks are its nice graphics.) Regardless, Tetris sells at ~10.00 per game and is bringing in money. The only reason they buy the game is because there aren't alternatives.

What is going on in the www is social networking: Facebook, Myspace, Twitter, Pownce, etc. What everyone would like to see is a multiplayer/social approach to iPhone games.

Currently there is only one multiplayer iPhone app game (Galcon). Coincidentally, Michael worked with the developer, Phil Hassey on the desktop version. So, he put me in contact with Phil, who disclosed his numbers to me: he has sold 10,000 games in a month (at ~\$10 per game). The issue with Galcon is that it attracts a very narrow audience. It is a game of strategy and manipulation, and it is hard to get into. Its not something just anyone would play. Its big among developers themselves, but too complicated for the average user. Despite this, he has made ~\$100,000. Also, Phil is a good friend of Michael's and is willing to share all of his experience to help my company succeed. He loves the idea of a MP approach to a simpler game.

One night, after discussing the iPhone appstore at length, I thought of Tetrinet. **Tetra** is the Greek derivative for numerical units of four. **Net** implies a social network/community. Tetrinet is a fast-paced puzzle game which involves arranging blocks of four-subunits on a screen and simultaneously competing with other players. With the iPhone's UI, a lot can be done with Tetrinet including implementing poke, flick, and drag properties as well as the tilt and flip (taking advantage of the accelerometer).

By marketing Tetrinet as a competitive and social entity, we have the power to foster a strong community built by score boards, online buddy systems, and challenge functions (where one user can choose to challenge another player for a higher position on the score board).

The inherent value of a multiplayer game can double/tripple sales...

We have the unique opportunity to take advantage of a marketing scheme based on a multiplayer platform: That is, we allow Tetrinet owners (hosts) to send challenges out to friends in their address book (guests). Tetrinet guests can then download a free version of Tetrinet that only permits playing against a host.

The benefit of this is twofold:

- 1) Our marketing is done for free -- who wouldn't want to challenge friends for free? This

- play when they want
- challenge who they want
- appear on the national scoreboard

2) Being able to play friends who aren't willing to pay is a huge feature that makes the game more valuable.

Phil Hassey took this very approach with his desktop version of Galcon, and this tactic alone created his empire.

In sum, the three reasons why tetrinet will absolutely succeed are as follows:

- 1) The concept is popular- everyone knows about it
- 2) Its simple to play (dead-simple rules, high replay value), and its simple to develop (much less challenging than poker, for example) and will be FAR better than the existing Tetris flop (which suffers from glitches and thus low ratings).
- 3) Its multiplayer- first mover advantage/ chance to take advantage of social network

Why no one else has done this yet...

When EA announced Tetris, no one thought it would be as bad as it is. At this point, its just a matter of time until someone beats them.

I am in the unique position of having direct, daily contact with some of the best engineers, artists, and electronic musicians in the industry. The number-one problem that businesses is face is recruiting good talent. However, Michael has provided me with bios of different developers with whom he has worked, and he knows which ones are the most efficient, creative, and driven.

Ive got a team together that is eager to get started (music producer, game app developer, network developer, and UI coder).

My position

The only way I can get a large cut in this is if I take care of everything BUT programming. My responsibilities are to secure funding, incorporate, and to take care of negotiations/lawyers/license, and advertising. This way, all that remains is sitting my team down and letting them do what they are good at.

In their minds, I have done and will continue to do all of the "hard work". This way, I set the terms.

I have calculated \$5,000 start-up expenses. (See spreadsheet)

- My options for funding, in no particular order, are as follows:**
- 1) Use what we have (my macbook, one of the developer's iPhones), take lower cut because my role is less significant; they might be able to do it on their own.
 - 2) Wait to months: Earn \$2,000 income, then fund the project by myself on bare minimum funds
 - 3) Fund project completely on credit, earn \$2000 later if startup fails
 - 4) Seed Investor Pomona alumn, full \$5k for 5-10%
 - 5) Michael's mom \$5,000 at 5%
 - 6) Incorporate first. (Latency period long.) Find and apply to established seed investor (I have two personal introductions to angel investors).

I can explain each of these further on the phone.

My questions to you are:

- 1) Is it possible to fund on credit/is the personal risk too high? If not, how do I go about extending my credit limit/ setting fixed interest rates or at least negotiating the best interest rates? Would some banks be better for this than others?
- 2) Do you think its a bad idea to get funding from MC's mom, considering the personal relationship?
- 3) Pomona alumn investor: pro is that we can start ASAP, con is that he seems to want to micromanage and will most likely want a higher cut

Also, I am doing some research about incorporating a business. So far, I have read that a C-corp is good to begin in Delaware because a good environment exists for business owners ("business is always right" mentality). In CA, on the other hand, users are always right. BUT doing a C-corp out-of-state disqualifies you from 800\$ first year rebate for CA businesses. Plus, you have to pay fees (\$400) for running out of CA.

A C-corp in CA would not be wise for a small business (taxed twice).

S-corp seems to be best option for CA:

- exempt from corporate tax
- Can update to C-corp smoothly
- Better for small businesses with individual owners (not VC companies)
- more likely to be considered for buy-out later on (than LLC)

As far as I know, no S-corp status exists in Delaware.

Any input here?

-Des

Attachment: startup_expenses.ods

EXHIBIT B

From: "Desiree Golen"
To: jturner@julieturnerlaw.com
Cc:
Bcc:
Date: Sat, 8 Nov 2008 02:43:14 -0800
Subject: Pro Bono Legal Consultation

Dear Julie,

Thank you for getting back to us!. I am very excited to be able to get some answers to my questions. I would love to meet sometime this coming week to discuss a few things.

I am currently in the process of developing a Tetromino game (<http://en.wikipedia.org/wiki/Tetromino>) with multi-player capabilities and new added features such as special keys, called TetraNet.

I have been following the Tetris story for the last few weeks and have learned a lot about patents, copyrighted materials, and trademark. As far as I know, and this is why I am requesting counsel, The Tetris Company LLC has no patent on the game concept of Tetris. Furthermore, my understanding of copyright in a programming context is as follows: it is certainly a copyright infringement to steal a developer's codebase without permission and SELL his/her product. However, unless a concept is patented, it is perfectly legal to create the "same" application from the ground up. By "same", I mean an application with identical features, NOT an application produced through stolen code.

The code for TetraNet is native. We have written everything completely from the ground up (Objective C in Xcode, available through Apple's SDK). We did not somehow get our hands on the the Tetris Company's code for their iPhone application and paste it into Xcode.

Moreover, as far as I know, "Tetris", or more correctly put, "Tetromino" is not a patented game. It was first created in Russia under the Soviet Union. Because private ownership was not an option, the developers of the original Tetromino game never claimed a patent. By the time Tetris (what it was later called) became popular in other countries including Japan, private game companies could not claim a patent because Tetromino was already widely popular and available in Russia.

Despite all of this, Henk Rogers and his legal hounds have been scavenging the Internet and terrorizing individual game developers (who use their own code, graphics, and music to develop and extend on the original Tetris) only to shut them down and steal their ideas.

In the last few months, The Tetris Company has attacked various iPhone developers who have attempted to compete with Tetris' buggy and overpriced application on the iPhone mobile platform. I have corresponded with Noah Witherspoon, the developer of Tris, who sent me a transcript of the Cease and Desist letter he received from the Tetris Company LLC. (see attached for file)

The developers of Teto Teto, Touchris, Shaker, and Kafablo received similar letters. Unfortunately, each developer was legally (and financially) unprepared to contradict the Tetris Company's claims of infringement with any legal backing. So, Apple, choosing to avoid any legal entanglement, submitted to The Tetris Company's request and terminated each application, one after another. (Attached is Noah's correspondence with Apple on the issue)

Tetris is my favorite game! I have been experimenting with new concepts for TetraNet, but I first would like to ensure that I fully understand the legal issues surrounding this controversy before I release my application. I would also like to draft an appropriate response to the C&D employed by the Tetris Company LLC.

Here is my most important question for you that perhaps we can discuss this coming week: does the Tetris Company have any valid claim to take action under the United States Copyright law? Because it seems to me that the Tetris Company is using the term "copyright" and "copy" incorrectly to bully third party developers (and apple) into removing their work from the appstore unjustly.

Some additional Information on my application, TetraNet:

- 1) Name: Tetra=greek derivative of four; Net= implies a social gaming network. (I.e two player and multi-player capabilities)
- 2) Description: TetraNet is a puzzle game which consist of arranging tetrominos on a screen in order to clear rows. Additional features include network play and "special keys". When you clear a row that contains a "special key" embedded in a tetromino piece, a function is called: "C" for example clears your opponent's board. "S" switched boards. "X" scrambles opponent's board.

Further informative websites I found helpful:

Below are some links that I found helpful:

http://everything2.com/index.pl?node_id=776131

http://abednarz.net/wp/?option=com_content&task=view&id=13&Itemid=45 (Kafablo)

<http://www.whatsoniphone.com/node/5618> (Shaker)

http://www.macworld.com/article/135200/2008/08/iphone_tetris.htm/ (tris)

As I said previously, I would absolutely love to get together and discuss the above issues. I am also a big fan of Red Rock, if its convenient for you. I am available on Tuesday after 2:00 pm, and basically all day Wednesday and Thursday. Please let me know what works best for you.

Thank you for all of your time. I really appreciate it; Any advise or guidance you can offer will bring me one step closer to ensuring an open Tetromino market!

Thank you once more,

Desiree Golen

On Thu, Nov 6, 2008 at 3:13 PM, Julie Turner <jturner@julieturnerlaw.com> wrote:

Hi Maura,

I would be more than happy to sit down with you and your partner and have a conversation about some of the contours of the law and the more specific questions on your mind. In order to prepare (and to make sure I have no conflicts), it would help me greatly if you could tell me the name of the other company (the one sending the cease and desist letters) and what they claim to have rights in.

I'm in Palo Alto. We could meet up at your office or at a Mountain View coffee house if you'd like.

Cheers,
Julie

Julie S. Turner
Turner Boyd LLP

Office: 650-494-1530
Fax: 650-472-8028
Cell: 408-914-1456

Attachment: noah_CD.doc

Attachment: noah_Apple.doc

EXHIBIT C

From: "Desiree Golen"

To: "Michael Carter"

Cc:

Bcc:

Date: Mon, 20 Oct 2008 12:47:43 -0700

Subject: Fwd: Tetris Licensing Packages

----- Forwarded message -----

From: **Gerilynn Okano** <gerilynn@blueplanetsoftware.com>

Date: Mon, Oct 20, 2008 at 12:39 PM

Subject: Re: Tetris Licensing Packages

To: Desiree Golen <desiree.golen@gmail.com>

Hi Desiree,

Thank you for your email. I work for Blue Planet Software, Inc., the licensing agent for The Tetris Company, LLC. While we appreciate your interest in licensing Tetris for the mobile platform, we cannot grant you a license for Tetris because we already have an exclusive licensee on this platform.

Best regards,

Gerilynn M. Okano

Administrator, Legal Affairs

Blue Planet Software, Inc.

55 Merchant Street, 17th Floor

Honolulu, HI 96813

Tel: 808.954.6114

Fax: 808.954.6101

Email: gerilynn@blueplanetsoftware.com

Blue Planet Software, Inc. is the sole agent for
The Tetris Company, LLC.

On Oct 18, 2008, at 4:33 PM, Desiree Golen wrote:

Hi, my name is Desiree Golen. I am considering developing a game similar to Tetris for the mobile platform, and I am emailing to inquire about your licensing options and packages.

Thank you for your time,

Desiree Golen

EXHIBIT D

From: iTunes Store
To: mghunt@gmail.com
Cc:
Bcc:
Date: Sat, 18 Oct 2008 22:40:10 -0700 (PDT)
Subject: Your receipt #6080985807

Billed To:
mghunt@gmail.com
Martin Hunt
151 Calderon Ave, Apt #253
Mountain View, CA 94041

Order Number: MGJFWKDDH9
Receipt Date: 10/18/08
Order Total: \$7.99
Billed To: MasterCard 1719

Item Number	Description	Unit Price	
Q1267	TETRIS, v1.0.86, Seller: Electronic Arts Report a Problem	\$7.99	
		Subtotal:	\$7.99
		Tax:	\$0.00
		Order Total:	\$7.99



Please retain for your records.

Please See Below For Terms And Conditions Pertaining To This Order.

Apple Inc.

You can find the iTunes Store Terms of Sale and Sales Policies by launching your iTunes application and clicking on Terms of Sale or Sales Policies

Answers to frequently asked questions regarding the iTunes Store can be found at
<http://www.apple.com/support/itunes/store/>

[Account Information](#) • [Purchase History](#)

Apple respects your privacy.

Information regarding your personal information can be viewed at <http://www.apple.com/legal/privacy/>

Copyright © 2008 Apple Inc. All rights reserved

EXHIBIT E

In The Matter Of:

TETRIS HOLDING, LLC

v.

XIO INTERACTIVE INC.

MICHAEL CARTER - 30(b)6

January 31, 2011

MERRILL CORPORATION

LegaLink, Inc.

135 Main Street
4th Floor

San Francisco, CA 94105
Phone: 415.357.4300
Fax: 415.357.4301

MICHAEL CARTER - 30(b)6 - 1/31/2011

Page 101				Page 103			
12:58:29	1	MS. MAITRA: Objection; vague; calls for a		01:01:37	1	in discovery?	
12:58:32	2	legal conclusion.		01:01:37	2	A. Yes, I believe that to be the case.	
12:58:33	3	THE WITNESS: You know, I'm not really sure		01:01:39	3	Q. Okay. And this discusses -- this document	
12:58:35	4	about the terms here, whether something is the same as a		01:01:44	4	indicates what was purchased and when in relation to	
12:58:39	5	branded game or not. What I can say is that Mino, as		01:01:48	5	the development of Mino; isn't that true?	
12:58:45	6	produced by -- as developed by Xio, takes a lot of		01:01:52	6	A. Yes.	
12:58:50	7	similar rules from a whole slew of games, and there's no		01:01:53	7	Q. And isn't it true that this document	
12:58:53	8	exact set of rules we've taken. And I think it's very		01:01:58	8	indicates --	
12:58:57	9	likely that the rules -- the rules of some of the games		01:01:59	9	A. Sorry, I don't know that everything here	
12:59:00	10	that your client has a copyright registration to are		01:02:01	10	relates to the development of Mino. I know that it	
12:59:03	11	similar to some of the rules that we have.		01:02:04	11	relates to the expenses of Xio Interactive as a whole.	
12:59:05	12	MS. CENDALI: Q. So Xio was aware of the		01:02:08	12	Q. And the only game that Xio Interactive ever	
12:59:08	13	Tetris iPhone game when it created Mino; isn't that		01:02:12	13	released was Mino, right?	
12:59:12	14	true?		01:02:14	14	A. Xio Interactive released Mino, as well as Mino	
12:59:13	15	MS. MAITRA: Objection; asked and answered.		01:02:17	15	Lite, and developed other games that they didn't	
12:59:15	16	THE WITNESS: As I said earlier --		01:02:20	16	release.	
12:59:19	17	MS. CENDALI: Q. Can you answer that yes?		01:02:21	17	Q. Right. Look at the heading on October 18th,	
12:59:20	18	Xio was aware of the Tetris iPhone game when it created		01:02:25	18	2008.	
12:59:24	19	Mino? Yes or no. Are you capable of answering that yes		01:02:26	19	A. Yes.	
12:59:28	20	or no?		01:02:27	20	Q. Isn't it -- doesn't that show that, as you	
12:59:28	21	MS. MAITRA: Objection; asked and answered.		01:02:32	21	have characterized it, Xio spent \$7.99 to purchase the	
12:59:29	22	And he answered it completely straightforwardly before.		01:02:38	22	Tetris EA App Store game?	
12:59:32	23	THE WITNESS: So I think I said before that		01:02:42	23	MS. MAITRA: Objection; mischaracterizes	
12:59:33	24	yes, Xio Interactive was aware --		01:02:43	24	testimony.	
12:59:35	25	MS. CENDALI: Q. And isn't it in fact true		01:02:45	25	THE WITNESS: So what I was saying before is	
Page 102				Page 104			
12:59:37	1	that in developing Mino, Xio downloaded the Tetris		01:02:47	1	that Martin purchased the game for his iPhone, and we	
12:59:44	2	iPhone game and studied it?		01:02:51	2	then looked at it to have an understanding of why	
12:59:49	3	MS. MAITRA: Objection; compound and vague.		01:02:54	3	competitors in our space would have such a low rating,	
12:59:53	4	THE WITNESS: So I don't think that that is a		01:02:58	4	and I think that this indicates that we either intended	
12:59:55	5	true statement that you made. I don't think that Xio,		01:03:02	5	to or considered reimbursing Martin Hunt.	
01:00:04	6	in developing Mino, downloaded EA Tetris and studied it.		01:03:06	6	MS. CENDALI: Q. Right. So isn't it true	
01:00:10	7	MS. CENDALI: Q. Did it download it?		01:03:08	7	that Martin Hunt, one of the shareholders of Xio and one	
01:00:11	8	A. So Martin Hunt downloaded, I believe, EA's		01:03:14	8	of the people who worked on developing Mino, downloaded	
01:00:17	9	Tetris, and I know that myself and Desiree and Martin		01:03:19	9	and purchased the Tetris EA iPhone game on October 18th,	
01:00:25	10	then looked at it for the purpose of understanding the		01:03:24	10	2008?	
01:00:27	11	competition, and to see -- really what we wanted to see		01:03:26	11	MS. MAITRA: Objection; lacks foundation; and	
01:00:32	12	was why a game in this space would have such a poor		01:03:28	12	asked and answered.	
01:00:36	13	rating. And, you know, we mostly did it because we were		01:03:32	13	THE WITNESS: I don't know that it was exactly	
01:00:40	14	interested in the competition in our space.		01:03:33	14	October 18th, 2008. It may well have been that's when	
01:00:57	15	Q. Let me show you what's been marked as		01:03:37	15	we considered reimbursing Martin, but it was likely	
01:00:59	16	Exhibit 7.		01:03:41	16	around that date that Martin downloaded and purchased a	
01:01:06	17	(Whereupon, Deposition Exhibit 7 was		01:03:45	17	version of a game by EA called Tetris.	
01:01:06	18	marked for identification.)		01:03:48	18	MS. CENDALI: Q. And isn't it true in	
01:01:07	19	MS. CENDALI: Q. Is Exhibit 7 a printout of		01:03:50	19	developing Mino, you and the other folks at Xio looked	
01:01:09	20	some of the expenses of Xio Interactive relating to the		01:03:57	20	at the Tetris EA game?	
01:01:15	21	development of Mino?		01:03:59	21	MS. MAITRA: Objection; vague; and asked and	
01:01:18	22	A. Uh-huh. So what are you asking again? Sorry.		01:04:01	22	answered.	
01:01:22	23	You're asking if it is the expense report?		01:04:02	23	THE WITNESS: I'm not sure what you mean by	
01:01:26	24	Q. Yes. I'm just establishing that isn't this a		01:04:04	24	"in developing Mino." When we were developing Mino, we	
01:01:29	25	copy of a spreadsheet from Xio that was produced to us		01:04:08	25	primarily were looking at our graphics, assets, and our	

26 (Pages 101 to 104)

Merrill Corporation - San Francisco

800-869-9132

www.merrillcorp.com/law

MICHAEL CARTER - 2/17/2011

322

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW JERSEY

3 --oo--

4 TETRIS HOLDING, LLC and THE)
5 TETRIS COMPANY, LLC,)
6)
7 Plaintiffs and)
8 Counterclaim-Defendants,)
9)
10 vs.) Civil Action No.
11) 3:09-CV-6115 (FLW) (DEA)
12)
13 XIO INTERACTIVE INC.,)
14)
15 Defendant and)
16 Counterclaim-Plaintiff.)
17)
18)
19)
20)
21)
22)
23)
24)
25)

13 VIDEOTAPED DEPOSITION OF
14 30 (b) (6)

15 MICHAEL CARTER

17 February 17, 2011

18 Volume II (Pages 322 - 378)

21 REPORTED BY:

22 JULIE ANNE ZEIGLER, RPR, CSR 9750

JOB #433584

23

24

25

Merrill Corporation - San Francisco

800-869-9132

www.merrillcorp.com/law

MICHAEL CARTER - 2/17/2011

01:18:03
01:18:02
01:18:14
01:18:15
01:18:19
01:18:24
01:18:27
01:18:30
01:18:34
01:18:37
01:18:40
01:18:42
01:18:46
01:18:50
01:18:54
01:18:57
01:18:59
01:18:60
01:18:64
01:18:68
01:18:72
01:18:76
01:18:79
01:18:82
01:18:85
01:18:88
01:18:91
01:18:94
01:18:97
01:18:100
01:18:103
01:18:106
01:18:109
01:18:112
01:18:115
01:18:118
01:18:121
01:18:124
01:18:127
01:18:130
01:18:133
01:18:136
01:18:139
01:18:142
01:18:145
01:18:148
01:18:151
01:18:154
01:18:157
01:18:160
01:18:163
01:18:166
01:18:169
01:18:172
01:18:175
01:18:178
01:18:181
01:18:184
01:18:187
01:18:190
01:18:193
01:18:196
01:18:199
01:18:202
01:18:205
01:18:208
01:18:211
01:18:214
01:18:217
01:18:220
01:18:223
01:18:226
01:18:229
01:18:232
01:18:235
01:18:238
01:18:241
01:18:244
01:18:247
01:18:250
01:18:253
01:18:256
01:18:259
01:18:262
01:18:265
01:18:268
01:18:271
01:18:274
01:18:277
01:18:280
01:18:283
01:18:286
01:18:289
01:18:292
01:18:295
01:18:298
01:18:301
01:18:304
01:18:307
01:18:310
01:18:313
01:18:316
01:18:319
01:18:322
01:18:325
01:18:328
01:18:331
01:18:334
01:18:337
01:18:340
01:18:343
01:18:346
01:18:349
01:18:352
01:18:355
01:18:358
01:18:361
01:18:364
01:18:367
01:18:370
01:18:373
01:18:376
01:18:379
01:18:382
01:18:385
01:18:388
01:18:391
01:18:394
01:18:397
01:18:400
01:18:403
01:18:406
01:18:409
01:18:412
01:18:415
01:18:418
01:18:421
01:18:424
01:18:427
01:18:430
01:18:433
01:18:436
01:18:439
01:18:442
01:18:445
01:18:448
01:18:451
01:18:454
01:18:457
01:18:460
01:18:463
01:18:466
01:18:469
01:18:472
01:18:475
01:18:478
01:18:481
01:18:484
01:18:487
01:18:490
01:18:493
01:18:496
01:18:499
01:18:502
01:18:505
01:18:508
01:18:511
01:18:514
01:18:517
01:18:520
01:18:523
01:18:526
01:18:529
01:18:532
01:18:535
01:18:538
01:18:541
01:18:544
01:18:547
01:18:550
01:18:553
01:18:556
01:18:559
01:18:562
01:18:565
01:18:568
01:18:571
01:18:574
01:18:577
01:18:580
01:18:583
01:18:586
01:18:589
01:18:592
01:18:595
01:18:598
01:18:601
01:18:604
01:18:607
01:18:610
01:18:613
01:18:616
01:18:619
01:18:622
01:18:625
01:18:628
01:18:631
01:18:634
01:18:637
01:18:640
01:18:643
01:18:646
01:18:649
01:18:652
01:18:655
01:18:658
01:18:661
01:18:664
01:18:667
01:18:670
01:18:673
01:18:676
01:18:679
01:18:682
01:18:685
01:18:688
01:18:691
01:18:694
01:18:697
01:18:700
01:18:703
01:18:706
01:18:709
01:18:712
01:18:715
01:18:718
01:18:721
01:18:724
01:18:727
01:18:730
01:18:733
01:18:736
01:18:739
01:18:742
01:18:745
01:18:748
01:18:751
01:18:754
01:18:757
01:18:760
01:18:763
01:18:766
01:18:769
01:18:772
01:18:775
01:18:778
01:18:781
01:18:784
01:18:787
01:18:790
01:18:793
01:18:796
01:18:799
01:18:802
01:18:805
01:18:808
01:18:811
01:18:814
01:18:817
01:18:820
01:18:823
01:18:826
01:18:829
01:18:832
01:18:835
01:18:838
01:18:841
01:18:844
01:18:847
01:18:850
01:18:853
01:18:856
01:18:859
01:18:862
01:18:865
01:18:868
01:18:871
01:18:874
01:18:877
01:18:880
01:18:883
01:18:886
01:18:889
01:18:892
01:18:895
01:18:898
01:18:901
01:18:904
01:18:907
01:18:910
01:18:913
01:18:916
01:18:919
01:18:922
01:18:925
01:18:928
01:18:931
01:18:934
01:18:937
01:18:940
01:18:943
01:18:946
01:18:949
01:18:952
01:18:955
01:18:958
01:18:961
01:18:964
01:18:967
01:18:970
01:18:973
01:18:976
01:18:979
01:18:982
01:18:985
01:18:988
01:18:991
01:18:994
01:18:997
01:18:1000
01:18:1003
01:18:1006
01:18:1009
01:18:1012
01:18:1015
01:18:1018
01:18:1021
01:18:1024
01:18:1027
01:18:1030
01:18:1033
01:18:1036
01:18:1039
01:18:1042
01:18:1045
01:18:1048
01:18:1051
01:18:1054
01:18:1057
01:18:1060
01:18:1063
01:18:1066
01:18:1069
01:18:1072
01:18:1075
01:18:1078
01:18:1081
01:18:1084
01:18:1087
01:18:1090
01:18:1093
01:18:1096
01:18:1099
01:18:1102
01:18:1105
01:18:1108
01:18:1111
01:18:1114
01:18:1117
01:18:1120
01:18:1123
01:18:1126
01:18:1129
01:18:1132
01:18:1135
01:18:1138
01:18:1141
01:18:1144
01:18:1147
01:18:1150
01:18:1153
01:18:1156
01:18:1159
01:18:1162
01:18:1165
01:18:1168
01:18:1171
01:18:1174
01:18:1177
01:18:1180
01:18:1183
01:18:1186
01:18:1189
01:18:1192
01:18:1195
01:18:1198
01:18:1201
01:18:1204
01:18:1207
01:18:1210
01:18:1213
01:18:1216
01:18:1219
01:18:1222
01:18:1225
01:18:1228
01:18:1231
01:18:1234
01:18:1237
01:18:1240
01:18:1243
01:18:1246
01:18:1249
01:18:1252
01:18:1255
01:18:1258
01:18:1261
01:18:1264
01:18:1267
01:18:1270
01:18:1273
01:18:1276
01:18:1279
01:18:1282
01:18:1285
01:18:1288
01:18:1291
01:18:1294
01:18:1297
01:18:1300
01:18:1303
01:18:1306
01:18:1309
01:18:1312
01:18:1315
01:18:1318
01:18:1321
01:18:1324
01:18:1327
01:18:1330
01:18:1333
01:18:1336
01:18:1339
01:18:1342
01:18:1345
01:18:1348
01:18:1351
01:18:1354
01:18:1357
01:18:1360
01:18:1363
01:18:1366
01:18:1369
01:18:1372
01:18:1375
01:18:1378
01:18:1381
01:18:1384
01:18:1387
01:18:1390
01:18:1393
01:18:1396
01:18:1399
01:18:1402
01:18:1405
01:18:1408
01:18:1411
01:18:1414
01:18:1417
01:18:1420
01:18:1423
01:18:1426
01:18:1429
01:18:1432
01:18:1435
01:18:1438
01:18:1441
01:18:1444
01:18:1447
01:18:1450
01:18:1453
01:18:1456
01:18:1459
01:18:1462
01:18:1465
01:18:1468
01:18:1471
01:18:1474
01:18:1477
01:18:1480
01:18:1483
01:18:1486
01:18:1489
01:18:1492
01:18:1495
01:18:1498
01:18:1501
01:18:1504
01:18:1507
01:18:1510
01:18:1513
01:18:1516
01:18:1519
01:18:1522
01:18:1525
01:18:1528
01:18:1531
01:18:1534
01:18:1537
01:18:1540
01:18:1543
01:18:1546
01:18:1549
01:18:1552
01:18:1555
01:18:1558
01:18:1561
01:18:1564
01:18:1567
01:18:1570
01:18:1573
01:18:1576
01:18:1579
01:18:1582
01:18:1585
01:18:1588
01:18:1591
01:18:1594
01:18:1597
01:18:1600
01:18:1603
01:18:1606
01:18:1609
01:18:1612
01:18:1615
01:18:1618
01:18:1621
01:18:1624
01:18:1627
01:18:1630
01:18:1633
01:18:1636
01:18:1639
01:18:1642
01:18:1645
01:18:1648
01:18:1651
01:18:1654
01:18:1657
01:18:1660
01:18:1663
01:18:1666
01:18:1669
01:18:1672
01:18:1675
01:18:1678
01:18:1681
01:18:1684
01:18:1687
01:18:1690
01:18:1693
01:18:1696
01:18:1699
01:18:1702
01:18:1705
01:18:1708
01:18:1711
01:18:1714
01:18:1717
01:18:1720
01:18:1723
01:18:1726
01:18:1729
01:18:1732
01:18:1735
01:18:1738
01:18:1741
01:18:1744
01:18:1747
01:18:1750
01:18:1753
01:18:1756
01:18:1759
01:18:1762
01:18:1765
01:18:1768
01:18:1771
01:18:1774
01:18:1777
01:18:1780
01:18:1783
01:18:1786
01:18:1789
01:18:1792
01:18:1795
01:18:1798
01:18:1801
01:18:1804
01:18:1807
01:18:1810
01:18:1813
01:18:1816
01:18:1819
01:18:1822
01:18:1825
01:18:1828
01:18:1831
01:18:1834
01:18:1837
01:18:1840
01:18:1843
01:18:1846
01:18:1849
01:18:1852
01:18:1855
01:18:1858
01:18:1861
01:18:1864
01:18:1867
01:18:1870
01:18:1873
01:18:1876
01:18:1879
01:18:1882
01:18:1885
01:18:1888
01:18:1891
01:18:1894
01:18:1897
01:18:1900
01:18:1903
01:18:1906
01:18:1909
01:18:1912
01:18:1915
01:18:1918
01:18:1921
01:18:1924
01:18:1927
01:18:1930
01:18:1933
01:18:1936
01:18:1939
01:18:1942
01:18:1945
01:18:1948
01:18:1951
01:18:1954
01:18:1957
01:18:1960
01:18:1963
01:18:1966
01:18:1969
01:18:1972
01:18:1975
01:18:1978
01:18:1981
01:18:1984
01:18:1987
01:18:1990
01:18:1993
01:18:1996
01:18:1999
01:18:2002
01:18:2005
01:18:2008
01:18:2011
01:18:2014
01:18:2017
01:18:2020
01:18:2023
01:18:2026
01:18:2029
01:18:2032
01:18:2035
01:18:2038
01:18:2041
01:18:2044
01:18:2047
01:18:2050
01:18:2053
01:18:2056
01:18:2059
01:18:2062
01:18:2065
01:18:2068
01:18:2071
01:18:2074
01:18:2077
01:18:2080
01:18:2083
01:18:2086
01:18:2089
01:18:2092
01:18:2095
01:18:2098
01:18:2101
01:18:2104
01:18:2107
01:18:2110
01:18:2113
01:18:2116
01:18:2119
01:18:2122
01:18:2125
01:18:2128
01:18:2131
01:18:2134
01:18:2137
01:18:2140
01:18:2143
01:18:2146
01:18:2149
01:18:2152
01:18:2155
01:18:2158
01:18:2161
01:18:2164
01:18:2167
01:18:2170
01:18:2173
01:18:2176
01:18:2179
01:18:2182
01:18:2185
01:18:2188
01:18:2191
01:18:2194
01:18:2197
01:18:2200
01:18:2203
01:18:2206
01:18:2209
01:18:2212
01:18:2215
01:18:2218
01:18:2221
01:18:2224
01:18:2227
01:18:2230
01:18:2233
01:18:2236
01:18:2239
01:18:2242
01:18:2245
01:18:2248
01:18:2251
01:18:2254
01:18:2257
01:18:2260
01:18:2263
01:18:2266
01:18:2269
01:18:2272
01:18:2275
01:18:2278
01:18:2281
01:18:2284
01:18:2287
01:18:2290
01:18:2293
01:18:2296
01:18:2299
01:18:2302
01:18:2305
01:18:2308
01:18:2311
01:18:2314
01:18:2317
01:18:2320
01:18:2323
01:18:2326
01:18:2329
01:18:2332
01:18:2335
01:18:2338
01:18:2341
01:18:2344
01:18:2347
01:18:2350
01:18:2353
01:18:2356
01:18:2359
01:18:2362
01:18:2365
01:18:2368
01:18:2371
01:18:2374
01:18:2377
01:18:2380
01:18:2383
01:18:2386
01:18:2389
01:18:2392
01:18:2395
01:18:2398
01:18:2401
01:18:2404
01:18:2407
01:18:2410
01:18:2413
01:18:2416
01:18:2419
01:18:2422
01:18:2425
01:18:2428
01:18:2431
01:18:2434
01:18:2437
01:18:2440
01:18:2443
01:18:2446
01:18:2449
01:18:2452
01:18:2455
01:18:2458
01:18:2461
01:18:2464
01:18:2467
01:18:2470
01:18:2473
01:18:2476
01:18:2479
01:18:2482
01:18:2485
01:18:2488
01:18:2491
01:18:2494
01:18:2497
01:18:2500
01:18:2503
01:18:2506
01:18:2509
01:18:2512
01:18:2515
01:18:2518
01:18:2521
01:18:2524
01:18:2527
01:18:2530
01:18:2533
01:18:2536
01:18:2539
01:18:2542
01:18:2545
01:18:2548
01:18:2551
01:18:2554
01:18:2557
01:18:2560
01:18:2563
01:18:2566
01:18:2569
01:18:2572
01:18:2575
01:18:2578
01:18:2581
01:18:2584
01:18:2587
01:18:2590
01:18:2593
01:18:2596
01:18:2599
01:18:2602
01:18:2605
01:18:2608
01:18:2611
01:18:2614
01:18:2617
01:18:2620
01:18:2623
01:18:2626
01:18:2629
01:18:2632
01:18:2635
01:18:2638
01:18:2641
01:18:2644
01:18:2647
01:18:2650
01:18:2653
01:18:2656
01:18:2659
01:18:2662
01:18:2665
01:18:2668
01:18:2671
01:18:2674
01:18:2677
01:18:2680
01:18:2683
01:18:2686
01:18:2689
01:18:2692
01:18:2695
01:18:2698
01:18:2701
01:18:2704
01:18:2707
01:18:2710
01:18:2713
01:18:2716
01:18:2719
01:18:2722
01:18:2725
01:18:2728
01:18:2731
01:18:2734
01:18:2737
01:18:2740
01:18:2743
01:18:2746
01:18:2749
01:18:2752
01:18:2755
01:18:2758
01:18:2761
01:18:2764
01:18:2767
01:18:2770
01:18:2773
01:18:2776
01:18:2779
01:18:2782
01:18:2785
01:18:2788
01:18:2791
01:18:2794
01:18:2797
01:18:2800
01:18:2803
01:18:2806
01:18:2809
01:18:2812
01:18:2815
01:18:2818
01:18:2821
01:18:2824
01:18:2827
01:18:2830
01:18:2833
01:18:2836
01:18:2839
01:18:2842
01:18:2845
01:18:2848
01:18:2851
01:18:2854
01:18:2857
01:18:2860
01:18:2863
01:18:2866
01:18:2869
01:18:2872
01:18:2875
01:18:2878
01:18:2881
01:18:2884
01:18:2887
01:18:2890
01:18:2893
01:18:2896
01:18:2899
01:18:2902
01:18:2905
01:18:2908
01:18:2911<br

MICHAEL CARTER - 2/17/2011

01:24:59
01:24:26
01:24:28
01:23:27
01:23:30
01:23:32
01:23:34
01:23:35
01:23:37
01:23:39
01:23:42
01:23:46
01:23:52
01:23:54
01:23:57
01:23:58
01:24:00
01:24:02
01:24:03
01:24:06
01:24:11
01:24:15
01:24:18
01:24:23
01:24:28

1 isn't it true that Mr. Neu had told you that Mino would
2 likely to be infringing?
3 MS. MAITRA: Okay. I instruct you not to
4 answer that. That's attorney-client privilege. And
5 this deposition is over.
6 MS. CENDALI: Okay. Fine.
7 THE WITNESS: I can't answer that based on the
8 attorney-client privilege.
9 MS. CENDALI: Fine. We will go to Court. We
10 will get more time. These documents should have been
11 produced long ago, and your clients should be sanctioned
12 for the way they're answering questions. Goodbye.
13 THE VIDEOGRAPHER: The marks the end of
14 Videotape No. 1 in the deposition --
15 MS. CENDALI: Wait, wait. No, no. Go back on
16 the record. Go back on the record.
17 THE VIDEOGRAPHER: Still on. Still on.
18 MS. CENDALI: I would like the record to
19 reflect that I would like to ask the witness about all
20 the documents that were produced late last night that we
21 have not had a chance to ask him or Desiree Golen, the
22 author of the documents, about. And we would like
23 either Mr. Carter or Ms. Golen to be produced for
24 deposition forthwith so we can ask them about these late
25 produced documents.

375

1 THE VIDEOGRAPHER: This marks the end of
2 Videotape No. 1 in the deposition of Michael Carter.
3 Going off the record. The time is 1:24.
4
5 (Whereupon, the deposition was
6 adjourned at 1:24 p.m.)
7
8 --oOo--
9
10 I declare under penalty of perjury that the
11 foregoing is true and correct. Subscribed at
12 _____, California, this ____ day of
13 _____, 2011.
14
15
16
17
18 MICHAEL CARTER
19
20
21
22
23
24
25

376

1 CERTIFICATE OF REPORTER
2
3
4 I, JULIE ANNE ZEIGLER, a Certified Shorthand
5 Reporter, hereby certify that the witness in the foregoing
6 deposition was by me duly sworn to tell the truth, the
7 whole truth and nothing but the truth in the
8 within-entitled cause;
9 That said deposition was taken down in shorthand
10 by me, a disinterested person, at the time and place
11 therein stated, and that the testimony of the said witness
12 was thereafter reduced to typewriting, by computer, under
13 my direction and supervision;
14 That before completion of the deposition, review
15 of the transcript was requested, if requested, any changes
16 made by the deponent (and provided to the reporter) during
17 the period allowed are appended hereto.
18
19 I further certify that I am not of counsel or
20 attorney for either or any of the parties to the said
21 deposition, nor in any way interested in the event of this
22 cause, and that I am not related to any of the parties
23 thereto.
24
25 DATED: February 25, 2011
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
559
560
561
562
563
564
565
566
567
568
569
569
570
571
572
573
574
575
576
577
578
579
579
580
581
582
583
584
585
586
587
588
589
589
590
591
592
593
594
595
596
597
598
599
599
600
601
602
603
604
605
606
607
608
609
609
610
611
612
613
614
615
616
617
618
619
619
620
621
622
623
624
625
626
627
628
629
629
630
631
632
633
634
635
636
637
638
639
639
640
641
642
643
644
645
646
647
648
649
649
650
651
652
653
654
655
656
657
658
659
659
660
661
662
663
664
665
666
667
668
669
669
670
671
672
673
674
675
676
677
678
679
679
680
681
682
683
684
685
686
687
688
689
689
690
691
692
693
694
695
696
697
698
699
699
700
701
702
703
704
705
706
707
708
709
709
710
711
712
713
714
715
716
717
718
719
719
720
721
722
723
724
725
726
727
728
729
729
730
731
732
733
734
735
736
737
738
739
739
740
741
742
743
744
745
746
747
748
749
749
750
751
752
753
754
755
756
757
758
759
759
760
761
762
763
764
765
766
767
768
769
769
770
771
772
773
774
775
776
777
778
779
779
780
781
782
783
784
785
786
787
788
789
789
790
791
792
793
794
795
796
797
798
799
799
800
801
802
803
804
805
806
807
808
809
809
810
811
812
813
814
815
816
817
818
819
819
820
821
822
823
824
825
826
827
828
829
829
830
831
832
833
834
835
836
837
838
839
839
840
841
842
843
844
845
846
847
848
849
849
850
851
852
853
854
855
856
857
858
859
859
860
861
862
863
864
865
866
867
868
869
869
870
871
872
873
874
875
876
877
878
879
879
880
881
882
883
884
885
886
887
888
889
889
890
891
892
893
894
895
896
897
898
899
899
900
901
902
903
904
905
906
907
908
909
909
910
911
912
913
914
915
916
917
918
919
919
920
921
922
923
924
925
926
927
928
929
929
930
931
932
933
934
935
936
937
938
939
939
940
941
942
943
944
945
946
947
948
949
949
950
951
952
953
954
955
956
957
958
959
959
960
961
962
963
964
965
966
967
968
969
969
970
971
972
973
974
975
976
977
978
979
979
980
981
982
983
984
985
986
987
988
989
989
990
991
992
993
994
995
996
997
998
999
999
1000
1000
1001
1002
1003
1004
1005
1006
1007
1008
1009
1009
10010
10011
10012
10013
10014
10015
10016
10017
10018
10019
10020
10021
10022
10023
10024
10025
10026
10027
10028
10029
10030
10031
10032
10033
10034
10035
10036
10037
10038
10039
10040
10041
10042
10043
10044
10045
10046
10047
10048
10049
10050
10051
10052
10053
10054
10055
10056
10057
10058
10059
10059
10060
10061
10062
10063
10064
10065
10066
10067
10068
10069
10069
10070
10071
10072
10073
10074
10075
10076
10077
10078
10079
10079
10080
10081
10082
10083
10084
10085
10086
10087
10088
10089
10089
10090
10091
10092
10093
10094
10095
10096
10097
10098
10099
10099
100100
100101
100102
100103
100104
100105
100106
100107
100108
100109
100110
100111
100112
100113
100114
100115
100116
100117
100118
100119
100120
100121
100122
100123
100124
100125
100126
100127
100128
100129
100130
100131
100132
100133
100134
100135
100136
100137
100138
100139
100140
100141
100142
100143
100144
100145
100146
100147
100148
100149
100150
100151
100152
100153
100154
100155
100156
100157
100158
100159
100160
100161
100162
100163
100164
100165
100166
100167
100168
100169
100170
100171
100172
100173
100174
100175
100176
100177
100178
100179
100179
100180
100181
100182
100183
100184
100185
100186
100187
100188
100189
100189
100190
100191
100192
100193
100194
100195
100196
100197
100198
100199
100199
100200
100201
100202
100203
100204
100205
100206
100207
100208
100209
100210
100211
100212
100213
100214
100215
100216
100217
100218
100219
100220
100221
100222
100223
100224
100225
100226
100227
100228
100229
100230
100231
100232
100233
100234
100235
100236
100237
100238
100239
100240
100241
100242
100243
100244
100245
100246
100247
100248
100249
100250
100251
100252
100253
100254
100255
100256
100257
100258
100259
100260
100261
100262
100263
100264
100265
100266
100267
100268
100269
100270
100271
100272
100273
100274
100275
100276
100277
100278
100279
100279
100280
100281
100282
100283
100284
100285
100286
100287
100288
100289
100289
100290
100291
100292
100293
100294
100295
100296
100297
100298
100299
100299
100300
100301
100302
100303
100304
100305
100306
100307
100308
100309
100310
100311
100312
100313
100314
100315
100316
100317
100318
100319
100320
100321
100322
100323
100324
100325
100326
100327
100328
100329
100330
100331
100332
100333
100334
100335
100336
100337
100338
100339
100340
100341
100342
100343
100344
100345
100346
100347
100348
100349
100350
100351
100352
100353
100354
100355
100356
100357
100358
100359
100360
100361
100362
100363
100364
100365
100366
100367
100368
100369
100370
100371
100372
100373
100374
100375
100376
100377
100378
100379
100379
100380
100381
100382
100383
100384
100385
100386
100387
100388
100389
100389
100390
100391
100392
100393
100394
100395
100396
100397
100398
100399
100399
100400
100401
100402
100403
100404
100405
100406
100407
100408
100409
100410
100411
100412
100413
100414
100415
100416
100417
100418
100419
100420
100421
100422
100423
100424
100425
100426
100427
100428
100429
100430
100431
100432
100433
100434
100435
100436
100437
100438
100439
100440
100441
100442
100443
100444
100445
100446
100447
100448
100449
100450
100451
100452
100453
100454
100455
100456
100457
100458
100459
100460
100461
100462
100463
100464
100465
100466
100467
100468
100469
100470
100471
100472
100473
100474
100475
100476
100477
100478
100479
100479
100480
100481
100482
100483
100484
100485
100486
100487
100488
100489
100489
100490
100491
100492
100493
100494
100495
100496
100497
100498
100499
100499
100500
100501
100502
100503
100504
100505
100506
100507
100508
100509
100510
100511
100512
100513
100514
100515
100516
100517
100518
100519
100520
100521
100522
100523
100524
100525
100526
100527
100528
100529
100530
100531
100532
100533
100534
100535
100536
100537
100538
100539
100540
100541
100542
100543
100544
100545
100546
100547
100548
100549
100550
100551
100552
100553
100554
100555
100556
100557
100558
100559
100559
100560
100561
100562
100563
100564
100565
100566
100567
100568
100569
100569
100570
100571
100572
100573
100574
100575
100576
100577
100578
100579
100579
100580
100581
100582
100583
100584
100585
100586
100587
100588
100589
100589
100590
100591
100592
100593
100594
100595
100596
100597
100598
100599
100599
100600
100601
100602
100603
100604
100605
100606
100607
100608
100609
100610
100611
100612
100613

EXHIBIT F

<p style="text-align: center;">1</p> <p style="text-align: center;">IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY -00o- TETRIS HOLDING, LLC and THE TETRIS COMPANY, LLC,) Plaintiffs and Counterclaim-Defendants,) vs.) Civil Action No.) 3:09-cv-6115(PLM)(DEA) XIO INTERACTIVE INC.,)) Defendant and Counterclaim-Plaintiff.) _____ VIDEOTAPEDE DEPOSITION OF DESIREE GOLEN _____ January 28, 2011</p> <p style="text-align: center;">REPORTED BY: JULIE ANNE ZEIGLER, RPR, CSR 9750 JOB #432442</p>	<p style="text-align: center;">3</p> <p style="text-align: center;">EXHIBITS MARKED FOR IDENTIFICATION CONTINUED</p> <p>1 No. Description Page 2 3 Exhibit 8 E-mail from Desiree Golen to Michael 130 Carter dated October 20, 2008. 4 Subject: Tetris Licensing Packages. Bates stamped XIO-DG 1220 - 1221. 5 Exhibit 9 E-mail from Desiree Golen to Maura 131 Carter dated October 23, 2008. 6 Subject: Tetris Licensing Packages. Bates stamped XIO-DG 1297 - 1298. 7 Exhibit 10 E-mail from Desiree Golen to 132 mauracarter@gmail.com dated October 22, 2008. Subject: iPhone Phun! Bates stamped XIO-DG 1272. 8 Exhibit 11 Document with the file name "Business 135 Plan." Bates stamped XIO-HD 34. 9 Exhibit 12 Initial Disclosures of Defendant 145 Xio Interactive, Inc. 10 Exhibit 13 E-mail from Michael Carter to 147 Martin Hunt dated November 15, 2008. 11 Subject: Go see Mike Jurewitz present about iPhone dev. Bates stamped XIO-MH 7567. 12 Exhibit 14 E-mail from Desiree Golen to 150 Michael Carter dated November 20, 2008. Subject: Haha Tetris Article. Bates stamped XIO-DG 20062. 13 Exhibit 15 E-mail from Michael Carter to 152 Martin Hunt, cc'd Desiree Golen dated November 22, 2008. Subject: Open GL. Bates stamped XIO-MC 19056 - 19057. 14 Exhibit 16 E-mail from Michael Carter to 154 xiointeractive@googlegroups.com dated December 28, 2008. Subject: Feature: Multiplayer room size? Bates stamped XIO-XI 8 - 9.</p>
<p style="text-align: center;">2</p> <p style="text-align: center;">1 I N D E X 2 INDEX OF EXAMINATIONS 3 Page 4 EXAMINATION BY 5 MS. CENDALI 10 6 7 EXHIBITS MARKED FOR IDENTIFICATION 8 No. Description Page 9 Exhibit 1 E-mail from Desiree Golen to 29 Thomas Golen dated October 6, 2008. 10 Subject: iPhone app. Bates stamped XIO-DG 927 - 931. 11 Exhibit 2 E-mail from Thomas Golen to Desiree 63 12 Golen dated October 7, 2008. Subject: iPhone app. Bates stamped XIO-DG 200021. 13 Exhibit 88 WordWeb Online dictionary definition 70 for "look like." 14 Exhibit 3 E-mail from Desiree Golen to Kathryn 78 15 Flynn dated October 6, 2008. Subject: iPhone app. Bates stamped XIO-DG 200016 - 200019. 16 Exhibit 4 Document entitled "Securities 88 Register." 17 Exhibit 5 Document entitled "Startup Expenses." 91 Bates stamped XIO-DG 932. 18 Exhibit 6 Document entitled "Sheet 1" dated 121 10/18/08 from Desiree Golen's desktop. Bates stamped XIO-HD 1449. 19 Exhibit 7 E-mail from Desiree Golen to 124 licensing@tetris.com dated October 18, 2008. Subject: Tetris Licensing Packages. Bates stamped XIO-DG 1194.</p>	<p style="text-align: center;">4</p> <p style="text-align: center;">EXHIBITS MARKED FOR IDENTIFICATION CONTINUED</p> <p>1 No. Description Page 2 3 Exhibit 17 E-mail from Desiree Golen to Richard 164 Lewis dated January 12, 2009. 4 Subject: Greetings! Bates stamped XIO-DG 3936. 5 Exhibit 18 E-mail from Martin to Xio 167 Interactive dated January 19, 2009. Subject: Menu Screen. Bates stamped XIO-XI 20 - 22. 6 Exhibit 19 E-mail from Desiree to Xio 175 Interactive dated January 6, 2009. Subject: Music. Bates stamped XIO-XI 12. 7 Exhibit 20 E-mail from Martin Hunt to 179 xiointeractive@googlegroups.com dated January 25, 2009. Subject: User Input Feedback. Bates stamped XIO-XI 25 - 26. 8 Exhibit 21 E-mail from Martin Hunt to 180 xiointeractive@googlegroups.com dated February 3, 2009. Subject: Multiplayer features: back to back line clearing bonuses. Bates stamped XIO-XI 33. 9 Exhibit 22 E-mail from Desiree Golen to 182 xiointeractive@googlegroups.com dated February 11, 2009. Subject: glacier tiles. Bates stamped XIO-XI 83. 10 Exhibit 23 E-mail from Jacob Rus to 184 xiointeractive@googlegroups.com dated February 11, 2009. Subject: Nightmare Mode. Bates stamped XIO-XI 91. 11 Exhibit 24 E-mail from Mario Balibera to 185 xiointeractive@googlegroups.com dated February 12, 2009. Subject: Nightmare Mode. Bates stamped XIO-XI 99 - 100.</p>

Merrill Corporation - San Francisco

800-869-9132

www.merrillcorp.com/law

<p style="text-align: center;">249</p> <p>06:23:16 1 copyrightable features of the Tetris game."</p> <p>06:23:19 2 Q. Right. And you yourself had read the Customs</p> <p>06:23:21 3 House decision, didn't you?</p> <p>06:23:23 4 A. I definitely read that document at some point</p> <p>06:23:27 5 in time. I don't -- again, I don't remember exactly all</p> <p>06:23:31 6 the details of that document or when I read it or how</p> <p>06:23:34 7 many times I read it.</p> <p>06:23:36 8 Q. Well, let's take a look at -- let's take a</p> <p>06:23:50 9 look at what we'll mark as Exhibit 39.</p> <p>06:23:53 10 (Whereupon, Deposition Exhibit 39 was</p> <p>06:23:53 11 marked for identification.)</p> <p>06:23:56 12 MS. CENDALI: Q. Is this an e-mail exchange</p> <p>06:23:58 13 of November 10th, 2008 with you and Todd Bilsborrow?</p> <p>06:24:17 14 A. I'm not completely familiar with this article.</p> <p>06:24:19 15 I haven't read it in completion for probably about two</p> <p>06:24:22 16 or three years, but I think that's -- I have no reason</p> <p>06:24:25 17 to believe that it's an e-mail from me to Todd.</p> <p>06:24:27 18 Q. And Todd was the person you were talking</p> <p>06:24:30 19 about earlier who had done the Kafabio game that was</p> <p>06:24:37 20 taken down, right?</p> <p>06:24:39 21 A. Yes, Todd was a Tetrimino developer.</p> <p>06:24:42 22 Q. Right. And the second page of this document,</p> <p>06:24:49 23 he's talking about communications with lawyers from</p> <p>06:24:52 24 Tetris. Do you see that?</p> <p>06:24:55 25 A. Which paragraph?</p>	<p style="text-align: center;">251</p> <p>06:26:21 1 the ideas, game mechanics, rules, or game functionality</p> <p>06:26:26 2 of another game, and that's what we did for Mino. And I</p> <p>06:26:30 3 was confused why the Tetris Company was -- was sending</p> <p>06:26:39 4 out these cease and desist letters, and I think it had</p> <p>06:26:43 5 something to do with that case about in regards to</p> <p>06:26:50 6 elements that I understood to be functional elements of</p> <p>06:26:55 7 a game.</p> <p>06:26:56 8 Q. In your expert experience?</p> <p>06:26:58 9 A. No, in my personal understanding based on the</p> <p>06:27:00 10 research that I did and the people that I talked to.</p> <p>06:27:03 11 Q. What people did you speak to that you were</p> <p>06:27:06 12 relying on in forming your opinion?</p> <p>06:27:08 13 A. The people that I spoke to while I was coming</p> <p>06:27:12 14 to an understanding of intellectual property, my own</p> <p>06:27:15 15 personal understanding: Jeffrey Neu, Julie Turner, Sean</p> <p>06:27:22 16 DeBruine, Chris Collins, I think his name was, I guess</p> <p>06:27:31 17 the lawyers at Durie Tangri.</p> <p>06:27:35 18 Q. I'm talking about people you spoke to before</p> <p>06:27:37 19 releasing Mino.</p> <p>06:27:39 20 A. Okay. So that would be Julie Turner, Jeffrey</p> <p>06:27:42 21 Neu, Sean DeBruine, Colin Chapman, I believe. There</p> <p>06:27:53 22 might have been more or less. And actually, I'm not</p> <p>06:27:56 23 sure if I spoke to Colin Chapman and Sean DeBruine</p> <p>06:28:00 24 before or after we released Mino.</p> <p>06:28:03 25 Q. And how many of those people are lawyers?</p>
<p style="text-align: center;">250</p> <p>06:24:56 1 Q. Second paragraph down. "A few days later, I</p> <p>06:24:59 2 sent an e-mail to the Tetris lawyer asking them to</p> <p>06:25:02 3 withdraw their infringement game not really expecting a</p> <p>06:25:05 4 response, but she actually did respond. She referred</p> <p>06:25:08 5 me to a decision that may help elucidate the</p> <p>06:25:10 6 copyrightable expression which is protected in our</p> <p>06:25:14 7 client's video game. Then she sent me a copy of the</p> <p>06:25:18 8 decision found here." Do you see that?</p> <p>06:25:21 9 A. Um-hum.</p> <p>06:25:22 10 Q. And he goes on to say, "Which is pretty much</p> <p>06:25:25 11 a joke if their defense is based on a letter from some</p> <p>06:25:29 12 random Customs agent." Do you see that?</p> <p>06:25:32 13 A. Yes.</p> <p>06:25:33 14 Q. And you responded to him at the top of the</p> <p>06:25:38 15 Exhibit 39, "Dear Todd, thanks for your response. I</p> <p>06:25:43 16 agree: This Customs letter is a rather bogus bedrock</p> <p>06:25:48 17 for a case," exclamation point. What did you mean by</p> <p>06:25:54 18 saying that the Customs letter was a rather bogus</p> <p>06:25:57 19 bedrock for a case?</p> <p>06:25:59 20 A. Again, I wrote this a long time ago, so I</p> <p>06:26:03 21 don't specifically remember what I meant, but I do</p> <p>06:26:06 22 remember that after I read the Customs letter -- well, in</p> <p>06:26:09 23 before I read the Customs letter, I was under the</p> <p>06:26:13 24 understanding that in terms of copyright -- well, in</p> <p>06:26:17 25 terms of video games, anyone can make a game that has</p>	<p style="text-align: center;">252</p> <p>06:28:05 1 A. To my understanding, all of those people are</p> <p>06:28:07 2 lawyers.</p> <p>06:28:08 3 Q. And are you claiming the privilege as to what</p> <p>06:28:17 4 those lawyers told you?</p> <p>06:28:18 5 MS. MAITRA: So, Desiree, to be clear,</p> <p>06:28:19 6 remember that we're claiming privilege in two respects:</p> <p>06:28:19 7 One, with attorneys -- conversations with attorneys that</p> <p>06:28:21 8 you actually retained; and two, conversations with</p> <p>06:28:26 9 attorneys where you had an expectation of</p> <p>06:28:28 10 confidentiality and made those communications for the</p> <p>06:28:31 11 purpose of seeking legal advice.</p> <p>06:28:33 12 THE WITNESS: So yes.</p> <p>06:28:36 13 MS. CENDALI: Q. So you're sitting here</p> <p>06:28:38 14 saying that lawyers told you that -- things that made</p> <p>06:28:42 15 you believe that you could copy Tetris, but that you are</p> <p>06:28:48 16 going to shield from discovery what those lawyers</p> <p>06:28:52 17 actually said to you; is that right?</p> <p>06:28:54 18 MS. MAITRA: Objection; mischaracterizes</p> <p>06:28:56 19 testimony.</p> <p>06:28:56 20 THE WITNESS: What I'm saying is the</p> <p>06:28:58 21 understanding that I gathered after speaking with those</p> <p>06:29:02 22 lawyers is that we could create a game with a certain</p> <p>06:29:06 23 rule set, ideas, game mechanics, and functionality, and</p> <p>06:29:11 24 of that time it would be of a Tetrimino game. And I was</p> <p>06:29:17 25 aware that we could create a Tetrimino game at that</p>

<p style="text-align: center;">253</p> <p>06:29:20 1 time, and the lawyers that I spoke to solidified that 06:29:25 2 understanding for me. 06:29:26 3 MS. CENDALI: Q. I see. And are 06:29:28 4 communications with those lawyers present on your 06:29:30 5 privilege log in this case? 06:29:34 6 A. I'm assuming they are. I don't really know 06:29:38 7 much about production. 06:29:47 8 Q. When you wrote, "I agree: This Customs 06:29:49 9 letter is a rather bogus bedrock for a case," did some 06:29:54 10 lawyer tell you the Customs decision was a bogus 06:29:57 11 bedrock? 06:30:02 12 MS. MAITRA: Again, to the extent this calls 06:30:03 13 for privileged communications, I instruct you not to 06:30:08 14 answer. 06:30:08 15 THE WITNESS: So I've been instructed not to 06:30:09 16 answer. 06:30:11 17 MS. MAITRA: To the extent. 06:30:12 18 THE WITNESS: Oh, okay, sorry. 06:30:14 19 MS. MAITRA: To the extent. I did not 06:30:15 20 instruct you not to answer the question, but only to the 06:30:20 21 extent. 06:30:20 22 THE WITNESS: Okay. I don't -- I don't know 06:30:23 23 exactly what a lawyer told me word for word, but, again, 06:30:29 24 based on my conversations with various intellectual 06:30:32 25 property lawyers, what I understood was that we could</p>	<p style="text-align: center;">255</p> <p>06:31:48 1 MS. CENDALI: Are you claiming good faith? 06:31:50 2 MS. MAITRA: Absolutely. Absolutely 06:31:50 3 100 percent. 06:31:52 4 MS. CENDALI: Okay. If her basis -- if part 06:31:52 5 of your basis of good faith -- and this witness was 06:31:56 6 identified in your initial disclosure as Mino's good 06:31:59 7 faith belief that it did not infringe, and a part of 06:32:03 8 that good faith is based, as Ms. Golen has testified, on 06:32:08 9 what lawyers have told her, that's using the privilege 06:32:10 10 as a sword versus a shield, and you've waived the 06:32:13 11 privilege. 06:32:14 12 MS. MAITRA: And I'm telling you that none of 06:32:15 13 our good faith belief is based -- a defense is based on 06:32:21 14 conversations with attorneys. 06:32:22 15 MS. CENDALI: Well, unfortunately, Ms. Golen 06:32:25 16 has testified that her opinion as to what she was 06:32:30 17 allowed to do was formed, in part, by what all these 06:32:34 18 lawyers told her, and that's a problem. 06:32:37 19 MS. MAITRA: But that doesn't mean, from a 06:32:39 20 legal standpoint, that that is the basis for our legal 06:32:42 21 defense for good faith -- for good faith defense. 06:32:47 22 MS. CENDALI: I'm sorry, you can't -- well, 06:32:50 23 we're not going to debate it. We disagree. Let's move 06:32:53 24 on. 06:32:53 25 MS. MAITRA: Okay.</p>
<p style="text-align: center;">254</p> <p>06:30:35 1 make a Tetrimino game. 06:30:37 2 MS. CENDALI: Q. I asked you whether a lawyer 06:30:39 3 told you that the Customs letter was a bogus bedrock? 06:30:45 4 MS. MAITRA: And again, to the extent that 06:30:48 5 this calls for communications with your lawyers, I 06:30:54 6 instruct you not to answer. 06:30:57 7 THE WITNESS: Okay. So you're asking me what 06:30:59 8 a lawyer would have told me, and all the lawyers I spoke 06:31:02 9 with -- 06:31:05 10 MS. CENDALI: Q. I'm asking you whether, when 06:31:07 11 you wrote "the Customs letter is a rather bogus bedrock 06:31:10 12 for a case," is that something that you got from a 06:31:13 13 lawyer? 06:31:14 14 MS. MAITRA: So can we go off the record for 06:31:16 15 one minute, please? We keep asking the same question. 06:31:20 16 I think there's a misunderstanding, and I would like to 06:31:22 17 make it out -- to discuss it out in the open with you. 06:31:24 18 I can make it on the record, too, if you'd like. 06:31:26 19 MS. CENDALI: Make it on the record. 06:31:27 20 MS. MAITRA: So we are not claiming advice of 06:31:29 21 counsel -- we're not claiming any sort of defense based 06:31:33 22 on advice of counsel. And so to the extent that you are 06:31:38 23 gathering testimony to prove that we are using 06:31:42 24 communications with attorneys as a sword and not a 06:31:45 25 shield, I object.</p>	<p style="text-align: center;">256</p> <p>06:32:54 1 MS. CENDALI: Q. Ms. Golen, in this exhibit, 06:32:56 2 Exhibit 39, Todd writes to you -- 06:33:01 3 MS. MAITRA: Thirty-eight. 06:33:04 4 MS. CENDALI: This is 39. We skipped 38. 06:33:09 5 MS. MAITRA: I'm sorry, okay. 06:33:10 6 MS. CENDALI: Q. In 39, Mr. Todd Bilsborrow 06:33:16 7 writes to you, "Which is pretty much of a joke if their 06:33:18 8 defense is based on a letter from some random Customs 06:33:23 9 agent." You see that? 06:33:24 10 A. Is this on the second page? 06:33:26 11 Q. Yes. We looked at it before. 06:33:29 12 A. Second paragraph? 06:33:29 13 Q. Same paragraph we read before. "She sent me 06:33:32 14 a copy of the decision found here, which is pretty much 06:33:35 15 of a joke if their defense is based on a letter from 06:33:38 16 some random Customs agent." You see that? 06:33:41 17 A. Yes, I see that. 06:33:43 18 Q. And you responded, "Thanks for your response. 06:33:45 19 I agree: This Customs letter is a rather bogus bedrock 06:33:49 20 for a case." Did you understand that the Customs 06:33:52 21 letter was written by a federal judge and not some 06:33:56 22 random Customs agent? 06:34:01 23 A. I wasn't aware of who wrote the document 06:34:05 24 exactly. I was aware that it was a Customs case with 06:34:10 25 two parties involved.</p>

<p style="text-align: center;">265</p> <p>06:45:32 1 features of the Tetris game as covered by the Tetris 06:45:36 2 registration includes,* and it goes on for 13 lines as 06:45:39 3 to what it includes, right, and you sitting here today 06:45:42 4 say I think those are rules and are not things you can 06:45:45 5 copyright; is that your opinion? 06:45:48 6 A. My opinion, again, is that a lot of these 06:45:53 7 elements are rules for Tetrimino games that cannot be 06:45:56 8 protected under copyright registration. 06:46:00 9 Q. So you disagree with the judge? 06:46:11 10 A. I don't believe that some of these elements -- 06:46:16 11 I don't believe that game rules can be protected by 06:46:19 12 copyright registration. 06:46:23 13 Q. So do you believe that the list here that the 06:46:25 14 judge wrote where he said these are copyrightable 06:46:28 15 features, in your opinion, as a 2008 graduate of Pomona 06:46:33 16 College majoring in psychology that you know better 06:46:37 17 than the judge; is that right? 06:46:42 18 A. I wouldn't say I know better than any judge. 06:46:46 19 What I do know is that I was confused about the context 06:46:48 20 of this letter, and I think I said, "I am curious what 06:46:53 21 the context of this letter is, and if there are any 06:46:55 22 further public archives that document your case 06:46:57 23 entirely." 06:46:59 24 Q. And you noticed in the Customs letter, which 06:47:03 25 is Exhibit 38, the paragraph that I just read enough to</p>	<p style="text-align: center;">267</p> <p>06:48:51 1 remember being confused as to federal cases and cases 06:48:56 2 that had to do with importing and the Customs office. 06:49:02 3 Q. But you didn't hire a lawyer to give you an 06:49:05 4 opinion letter that this Customs decision would be no 06:49:11 5 bar to the release of Mino; isn't that true? You 06:49:18 6 didn't get a lawyer who would understand this saying to 06:49:20 7 you no problem, go ahead, release Mino, right? 06:49:24 8 MS. MAITRA: Objection; mischaracterizes 06:49:24 9 testimony. I instruct you not to answer. 06:49:30 10 THE WITNESS: Um -- 06:49:30 11 MS. MAITRA: I instruct you not to answer 06:49:32 12 completely. 06:49:33 13 MS. CENDALI: Q. And in your view, do you 06:49:34 14 believe -- focusing on the paragraph we've been talking 06:49:36 15 about and the judge's opinion, do you believe that any 06:49:40 16 of the items listed by there of the judge as 06:49:45 17 copyrightable features are not copyrightable features, 06:49:49 18 in your wisdom? 06:49:52 19 A. Yes, I believe that all of the game rules 06:49:55 20 referenced in this paragraph to Tetrimino games are not 06:50:00 21 protected by copyright. 06:50:01 22 Q. So, you tell me in this paragraph, in your 06:50:05 23 opinion, what is not protected by copyright? 06:50:08 24 MS. MAITRA: Objection; calls for a legal 06:50:10 25 conclusion.</p>
<p style="text-align: center;">266</p> <p>06:47:14 1 copy it and put it in your letter to Mr. Cormier, 06:47:22 2 Exhibit 39, and your letter to Mr. Reback, Exhibit 40, 06:47:26 3 right? 06:47:28 4 A. It looks like the same text. There's an 06:47:31 5 overlap in text between my letter to Mr. Cormier and 06:47:35 6 Mr. -- I'm not sure about the Reback one -- yes, and the 06:47:41 7 Reback one looks like -- 06:47:43 8 Q. And in both of them, you included the 06:47:45 9 paragraph that we've been discussing on Exhibit 38, 06:47:55 10 where the judge detailed in 13 lines the copyrightable 06:47:57 11 features of the Tetris game, right? 06:47:58 12 A. Again, that paragraph is something that I was 06:48:04 13 curious about because I wasn't sure of the context of 06:48:07 14 that letter. I didn't know what it meant, that that was 06:48:11 15 a letter. 06:48:12 16 Q. Right. And you knew when it said that the 06:48:15 17 copyrightable features of the Tetris game included 06:48:18 18 those things, that that could be a problem for Mino, 06:48:21 19 right? 06:48:23 20 A. It seems like based on my response to Todd, I 06:48:30 21 didn't think that was a solid bedrock of a case. And I 06:48:33 22 think it had to do with the fact that I was unclear as 06:48:36 23 to the context of this letter, and I think I remember 06:48:42 24 discussing the -- and I'm not a lawyer. I'm not an 06:48:47 25 expert. I don't know better than any judge, but I</p>	<p style="text-align: center;">268</p> <p>06:50:10 1 THE WITNESS: Okay. So I'm not a lawyer, and, 06:50:12 2 again, the context of this letter had to do with the 06:50:17 3 Customs office, and I knew that we wouldn't be importing 06:50:20 4 Emo -- Mino, so I wasn't sure if it was relevant. 06:50:30 5 MS. CENDALI: Q. Well, you know that it was 06:50:32 6 cited against your friend by the Tetris Company's lawyer 06:50:35 7 as relevant when he inquired about Kafablo, which was 06:50:41 8 taken down as well, right? 06:50:42 9 A. I know that Todd was sent an attachment to 06:50:46 10 this -- 06:50:50 11 Q. And he told you that the Tetris Company 06:50:55 12 lawyer sent it to him saying that this decision -- that 06:51:01 13 this might be a decision which may help elucidate the 06:51:06 14 copyrightable expression which is protected in our 06:51:10 15 client's video game. You knew that, right? 06:51:20 16 A. What I knew at the time was that -- what I 06:51:25 17 understood at the time was that the Tetris Company was 06:51:28 18 sending out cease and desist letters, and I thought that 06:51:32 19 it was a way to intimidate independent developers off 06:51:36 20 their specific platforms. 06:51:38 21 Q. Do you own a single copyright, Ms. Golen? 06:51:42 22 A. I'm not a lawyer, so I don't know the specific 06:51:44 23 details of copyright. 06:51:47 24 Q. I see. In this exhibit, Exhibit 38, where 06:51:52 25 the judge wrote, "The copyrightable features of the</p>

<p style="text-align: center;">281</p> <p>07:08:31 1 Tetrmino game.</p> <p>07:08:34 2 Q. Actual creation of a game, actual</p> <p>07:08:37 3 programming.</p> <p>07:08:38 4 A. Actual programming. I'm not sure when the</p> <p>07:08:41 5 actual programming began.</p> <p>07:08:45 6 Q. Despite being listed on the initial</p> <p>07:08:47 7 disclosures as knowledge about the game development and</p> <p>07:08:50 8 despite being the CEO, you have no idea of when</p> <p>07:08:54 9 programming began on Mino; is that right?</p> <p>07:08:56 10 MS. MAITRA: Objection; mischaracterizes</p> <p>07:08:57 11 testimony.</p> <p>07:08:58 12 THE WITNESS: What I would say is that it was</p> <p>07:08:59 13 about two or three years ago. So I can't tell you</p> <p>07:09:02 14 exactly when we began development.</p> <p>07:09:05 15 MS. CENDALI: Q. So you write your dad and</p> <p>07:09:08 16 you write your boyfriend's mom about this idea for a</p> <p>07:09:15 17 multiplayer game similar to Tetris in that same month</p> <p>07:09:20 18 you're contacting lawyers who might represent you pro</p> <p>07:09:27 19 bono; is that right?</p> <p>07:09:33 20 A. I had contacted Michael's mother and my</p> <p>07:09:36 21 father, and I think, by this time, I had asked -- I sent</p> <p>07:09:45 22 an e-mail to the EFF myself, and I think I had asked for</p> <p>07:09:47 23 Maura to contact the EFF in order to get more</p> <p>07:09:52 24 information on intellectual property and video games.</p> <p>07:09:55 25 Q. And isn't it true that you had asked Maura</p>	<p style="text-align: center;">283</p> <p>07:11:53 1 I think at some points we discussed creating other</p> <p>07:11:57 2 games, like Combo Lock, but it wasn't -- right.</p> <p>07:12:06 3 MS. CENDALI: Q. Why didn't you -- was Combo</p> <p>07:12:09 4 Lock based on any preexisting game?</p> <p>07:12:12 5 A. I don't exactly remember Combo Lock very well.</p> <p>07:12:16 6 It was another game developer's vision. I think what I</p> <p>07:12:21 7 remember was that it had something to do with unlocking</p> <p>07:12:28 8 a safe.</p> <p>07:12:30 9 Q. And why didn't you create Combo Lock instead</p> <p>07:12:35 10 of proceeding with Mino in the face of the copyright</p> <p>07:12:44 11 registrations and other rights owned by my clients?</p> <p>07:12:51 12 MS. MAITRA: Objection; vague.</p> <p>07:12:51 13 THE WITNESS: I would say that the reason we</p> <p>07:12:53 14 created Mino was because we wanted to create a</p> <p>07:12:57 15 multiplayer Tetrmino game, and my understanding at the</p> <p>07:13:03 16 time before development and during development and now</p> <p>07:13:07 17 is that there's no patent. Though I'm not a lawyer, my</p> <p>07:13:13 18 understanding is that what does protect an idea or set</p> <p>07:13:17 19 of rules or functionality of a game is a patent, and I</p> <p>07:13:22 20 was not aware of a patent that anyone ever secured for</p> <p>07:13:26 21 the original game.</p> <p>07:13:29 22 MS. CENDALI: Q. And was part of that view</p> <p>07:13:30 23 based on your conversations with lawyers?</p> <p>07:13:33 24 MS. MAITRA: Objection; to the extent that</p> <p>07:13:37 25 this calls for privileged communications, I instruct you</p>
<p style="text-align: center;">282</p> <p>07:09:58 1 earlier that month to find you pro bono counsel?</p> <p>07:10:03 2 A. I don't recall specifically. I think I asked</p> <p>07:10:11 3 if she could contact the EFF and help us try to find</p> <p>07:10:18 4 someone who would see the vision of our company and find</p> <p>07:10:25 5 a low cost way, potentially, of working with them.</p> <p>07:10:30 6 Q. And in this e-mail, you -- Ms. Carter wrote</p> <p>07:10:34 7 to you, "Several persons at Apple has informed me that</p> <p>07:10:37 8 conflict resolution policies vary, and there are two</p> <p>07:10:41 9 options. 1) Create a different kind of game app. 2)</p> <p>07:10:45 10 Build a case using legal assistance for stronger</p> <p>07:10:49 11 negotiations." What did you understand Ms. Carter</p> <p>07:10:56 12 meant when you read the "build a case using legal</p> <p>07:11:01 13 assistance for stronger negotiations"? What was your</p> <p>07:11:06 14 understanding when you read that of what was meant?</p> <p>07:11:10 15 A. I don't know exactly what my understanding was</p> <p>07:11:12 16 at the time. It was about three years ago. But sitting</p> <p>07:11:15 17 here now, I can tell you that I probably understood that</p> <p>07:11:19 18 there are two ways to resolve a conflict involving</p> <p>07:11:24 19 Apple, and one was to create a different type of game or</p> <p>07:11:26 20 to build a case using legal assistance.</p> <p>07:11:29 21 Q. Did you consider creating a different type of</p> <p>07:11:34 22 game that was wholly original to Xio?</p> <p>07:11:40 23 MS. MAITRA: Objection; vague.</p> <p>07:11:42 24 THE WITNESS: I believe that Mino was an</p> <p>07:11:47 25 original game. We created everything from scratch. And</p>	<p style="text-align: center;">284</p> <p>07:13:40 1 not to answer.</p> <p>07:13:42 2 THE WITNESS: I'm not sure. I know I spoke</p> <p>07:13:43 3 with many lawyers.</p> <p>07:13:48 4 MS. CENDALI: Q. Let's look at Exhibit 45.</p> <p>07:13:50 5 (Whereupon, Deposition Exhibit 45 was</p> <p>07:13:50 6 marked for identification.)</p> <p>07:13:53 7 THE WITNESS: Can I grab some water?</p> <p>07:13:56 8 MS. CENDALI: Sure.</p> <p>07:13:56 9 Go off the record.</p> <p>07:13:58 10 THE VIDEOGRAPHER: Going off the record. The</p> <p>07:14:06 11 time is 7:14.</p> <p>07:14:06 12 (Break in proceedings.)</p> <p>07:17:52 13 THE VIDEOGRAPHER: We're back on the record.</p> <p>07:17:53 14 The time is 7:18.</p> <p>07:17:55 15 MS. CENDALI: Q. Ms. Golen, is Exhibit 45 a</p> <p>07:17:59 16 screenshot of the application description of Mino that</p> <p>07:18:02 17 was available on Apple's iTunes?</p> <p>07:18:05 18 A. It looks like this is a screenshot.</p> <p>07:18:08 19 Q. And it says in the upper left-hand corner</p> <p>07:18:11 20 "Release May 9th, 2009, Version 1.0." Was that when</p> <p>07:18:17 21 Mino was first made available on iTunes?</p> <p>07:18:23 22 A. I know iTunes are -- the App Store had some</p> <p>07:18:30 23 weird algorithm for their release date, but it was</p> <p>07:18:36 24 released at least by May 9th, 2009, I think.</p> <p>07:18:40 25 Q. This is Version 1.0. Were there other</p>

Merrill Corporation - San Francisco

800-869-9132

www.merrillcorp.com/law

297		299	
07:36:04	1	MS. MAITRA: What's the Bates number on this?	07:39:45
07:36:06	2	MR. PATHIYAL: XIO-DG 0016404.	07:39:45
07:36:14	3	MS. MAITRA: Okay, this I am clawing back	07:39:45
07:36:17	4	under the protective order. I have reason to believe	07:39:50
07:36:20	5	that this is privileged, and it was inadvertently	07:39:51
07:36:23	6	produced.	07:39:53
07:36:28	7	MS. CENDALI: Q. Does this reflect	07:39:56
07:36:29	8	communication -- well, was this -- does this document	07:40:00
07:36:37	9	reflect communication with one of your lawyers,	07:40:04
07:36:39	10	Ms. Golen?	07:40:06
07:36:50	11	A. By "communication," what do you mean?	07:40:07
07:36:52	12	MS. MAITRA: So what I would like to do is	07:40:12
07:36:54	13	instruct the witness not to answer any document --	07:40:14
07:36:57	14	sorry, any questions about this document. I believe	07:40:16
07:37:00	15	this to be privileged. I have no reason to believe that	07:40:18
07:37:02	16	it wasn't privileged.	07:40:22
07:37:03	17	MS. CENDALI: Okay. We reserve all our	07:40:34
07:37:05	18	rights, and we'll discuss it --	07:40:34
07:37:07	19	MS. MAITRA: Absolutely.	07:40:35
07:37:07	20	MS. CENDALI: -- separately.	07:40:36
07:37:11	21	MS. MAITRA: Yes.	07:40:38
07:37:26	22	MS. CENDALI: Q. I'm going to show you	07:40:41
07:37:27	23	Exhibit 54.	07:40:42
07:37:28	24	(Whereupon, Deposition Exhibit 54 was	07:40:42
07:37:28	25	marked for identification.)	07:40:46
298		300	
07:37:29	1	MS. CENDALI: Q. It says "Tetris Company	07:40:48
07:37:31	2	Legal Notes." Who authored this document?	07:40:53
07:38:23	3	A. I believe Michael Carter authored this	07:40:57
07:38:26	4	document.	07:40:58
07:38:27	5	Q. When was this document authored?	07:41:01
07:38:30	6	A. You'd have to ask Michael Carter.	07:41:03
07:38:32	7	Q. What is your understanding as to why this	07:41:04
07:38:34	8	document was authored?	07:41:08
07:38:39	9	A. You'd have to ask Michael why he authored and	07:41:11
07:38:43	10	created this document.	07:41:15
07:38:46	11	Q. How was this document used, if at all?	07:41:18
07:38:52	12	A. I'm not sure exactly how it was used. I	07:41:20
07:38:54	13	know -- I think we might have shared it with different	07:41:22
07:39:02	14	lawyers that we had met with.	07:41:24
07:39:10	15	Q. Let's look at Exhibit 50.	07:41:29
07:39:14	16	(Whereupon, Deposition Exhibit 50 was	07:41:33
07:39:14	17	marked for identification.)	07:41:34
07:39:16	18	MS. CENDALI: Q. Is this an e-mail you sent	07:41:37
07:39:18	19	to Maura Carter or November 11, 2008 attaching a copy of	07:41:44
07:39:23	20	the -- of a portion of a copyright office circular?	07:41:47
07:39:30	21	A. That looks -- that looks right. This is an	07:41:48
07:39:36	22	attachment, you said? Or it's part -- I think it's an	07:41:49
07:39:40	23	attachment.	07:41:52
07:39:42	24	Q. Yes, it looks like an attachment.	07:41:54
07:39:44	25	MS. MAITRA: Actually --	07:41:57

EXHIBIT G

ID NUMBER	AUTHOR	RECIPIENT	CC	BCC	ADD'L RECIPIENTS	DATE	DOCUMENT DESCRIPTION	PRIVILEGE CLAIMED
XIO-DG-0001195	Desiree Golen	Desiree Golen				10/18/2008	Draft of letter to attorney re: termination from App Store	Attorney-client privilege (Fed. R. Evid. 502(g)(1); prepared in anticipation of litigation
XIO-DG-0001675-76	Desiree Golen	Desiree Golen				11/6/2008	Draft of letter to attorney re: termination from App Store	Attorney-client privilege (Fed. R. Evid. 502(g)(1); prepared in anticipation of litigation
XIO-DG-0001766-68	Desiree Golen	Julie Turner				11/8/2008	Email re: potential representation	Attorney-client privilege (Fed. R. Evid. 502(g)(1); prepared in anticipation of litigation
XIO-DG-0001876-79	Julie Turner	Desiree Golen				11/8/2009	Email re: potential representation	Attorney-client privilege (Fed. R. Evid. 502(g)(1); prepared in anticipation of litigation
XIO-DG-0001897-900	Desiree Golen	Julie Turner				11/8/2008	Email re: potential representation	Attorney-client privilege (Fed. R. Evid. 502(g)(1); prepared in anticipation of litigation
XIO-DG-0001904-07	Julie Turner	Desiree Golen				11/8/2008	Email re: potential representation	Attorney-client privilege (Fed. R. Evid. 502(g)(1); prepared in anticipation of litigation
XIO-DG-0001932-35	Desiree Golen	Julie Turner				11/8/2008	Email re: potential representation	Attorney-client privilege (Fed. R. Evid. 502(g)(1); prepared in anticipation of litigation
XIO-DG-0002051	Michael Carter	Desiree Golen				11/11/2008	Email re: potential representation	Attorney-client privilege (Fed. R. Evid. 502(g)(1); prepared in anticipation of litigation
XIO-DG-0002062	Desiree Golen	Desiree Golen				11/11/2008	Notes for conversation with Jeffrey C. Neu re: potential representation	Attorney-client privilege (Fed. R. Evid. 502(g)(1); prepared in anticipation of litigation
XIO-DG-0002111-14	Desiree Golen	Desiree Golen				11/11/2008	Draft of email to G. Reback re: potential representation	Attorney-client privilege (Fed. R. Evid. 502(g)(1); prepared in anticipation of litigation
XIO-DG-0002116	Desiree Golen	Desiree Golen				11/12/2008	Note re: potential representation	Attorney-client privilege (Fed. R. Evid. 502(g)(1); prepared in anticipation of litigation

LEGEND:
Counsels' names in **bold**.

Attorney-Client Privilege;
Attorney Work-Product.

ID NUMBER	AUTHOR	RECIPIENT	CC	BCC	ADD'L RECIPIENTS	DATE	DOCUMENT DESCRIPTION	PRIVILEGE CLAIMED
XIO-DG-0002141-43	Desiree Golen	G. Reback				11/13/2008	Email re: potential representation	Attorney-client privilege (Fed. R. Evid. 502(g)(1); prepared in anticipation of litigation
XIO-DG-0002147-49	Desiree Golen	Anthony Cormier				11/13/2008	Email re: potential representation	Attorney-client privilege (Fed. R. Evid. 502(g)(1); prepared in anticipation of litigation
XIO-DG-0002152	Desiree Golen	Michael Carter				11/13/2008	Email re: meeting with counsel and pending tasks	Attorney-client privilege (Fed. R. Evid. 502(g)(1); prepared in anticipation of litigation
XIO-DG-0002298	Desiree Golen	Desiree Golen				11/19/2008	Draft of notes for conversation with Jeffrey C. Neu re: potential strategy	Attorney-client privilege (Fed. R. Evid. 502(g)(1); prepared in anticipation of litigation
XIO-DG-0002353	Julie Turner	Desiree Golen'				11/22/2008	Email re: legal analysis	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XIO-DG-0002722	Desiree Golen	Desiree Golen				12/12/2008	Note re: patent and trademark analysis	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XIO-DG-0003039	Desiree Golen	Mario Balibrera				12/19/2008	Email re: activities of Jeffrey C. Neu in product preparation	
XIO-DG-0006576	Desiree Golen	Michael Carter				3/20/2009	Email re: materials forwarded to attorney	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XIO-DG-0007901	Desiree Golen	Desiree Golen				4/28/2009	Draft of email to potential counsel	Attorney-client privilege (Fed. R. Evid. 502(g)(1); prepared in anticipation of litigation
XIO-DG-0008032	Desiree Golen	Desiree Golen				4/30/2009	Draft of email to potential counsel	Attorney-client privilege (Fed. R. Evid. 502(g)(1); prepared in anticipation of litigation

LEGEND:

Counsels' names in **bold**.

Attorney-Client Privilege;

Attorney Work-Product.

ID NUMBER	AUTHOR	RECIPIENT	CC	BCC	ADD'L RECIPIENTS	DATE	DOCUMENT DESCRIPTION	PRIVILEGE CLAIMED
XIO-HD-DG-0007339	Desiree Golen	Desiree Golen				8/5/2009	Notes re: conversation with Jeffrey C. Neu	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XIO-HD-DG-0013253	Desiree Golen	Desiree Golen				9/25/2009	Notes re: conversation with Jeffrey C. Neu	Attorney-client privilege (Fed. R. Evid. 502(g)(1); prepared in anticipation of litigation
XIO-HD-DG-0016147	Desiree Golen	Desiree Golen				11/6/2008	Notes re: retention of counsel	Attorney-client privilege (Fed. R. Evid. 502(g)(1); prepared in anticipation of litigation
XIO-HD-DG-0016148	Desiree Golen	Desiree Golen				Undated	Golen notes pertaining to Toyota lawsuit involving other family member	Attorney-client privilege (Fed. R. Evid. 502(g)(1); prepared in anticipation of litigation
XIO-HD-DG-0016174	Desiree Golen	Desiree Golen				8/5/2009	Notes re: conversation with Jeffrey C. Neu	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XIO-HD-DG-0016218	Desiree Golen	Desiree Golen				9/25/2009	Email re conversation with Jeffrey C. Neu	Attorney-client privilege (Fed. R. Evid. 502(g)(1); prepared in anticipation of litigation
XIO-HD-DG-0016845	Desiree Golen	Desiree Golen				5/13/2009	Notes re: teleconference with Jeffrey C. Neu	Attorney-client privilege (Fed. R. Evid. 502(g)(1); prepared in anticipation of litigation
XIO-HD-MH-0009515	Joseph Gratz	Michael Carter	Desiree Golen			6/18/2010	Email re: Retainer Agreement	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2)
XIO-HD-XIO-0000014	Desiree Golen	G. Reback				11/11/2008	Email re: potential representation	Attorney-client privilege (Fed. R. Evid. 502(g)(1); prepared in anticipation of litigation
XIO-HD-XIO-0000021	Desiree Golen	Anthony Cormier				11/13/2008	Email re: potential representation	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation

LEGEND:

Counsels' names in **bold**.

Attorney-Client Privilege;

Attorney Work-Product.

ID NUMBER	AUTHOR	RECIPIENT	CC	BCC	ADD'L RECIPIENTS	DATE	DOCUMENT DESCRIPTION	PRIVILEGE CLAIMED
XIO-HD-XIO-0000039	L. Hudd	xiointeractive@googlegroups.com				Undated	Email re: assessment of Tetris' trademark claims	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XIO-HD-XIO-0000043	Desiree Golen	Desiree Golen				Various	Drafts of letter to potential counsel	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XIO-HD-XIO-0001455	Desiree Golen	Anthony Cormier				11/13/2008	Email re: potential representation	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XIO-HD-XIO-0001484	Desiree Golen	G. Reback				11/11/2008	Email re: potential representation	Attorney-client privilege (Fed. R. Evid. 502(g)(1); prepared in anticipation of litigation
XIO-HD-XIO-0001593	Desiree Golen	Desiree Golen				5/13/2009	Email notes re: teleconference with Jeffrey C. Neu	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XIO-HD-XIO-K-0000010	Desiree Golen	Desiree Golen				5/13/2009	Notes re: teleconference with Jeffrey C. Neu	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XIO-HD-XIO-K-0000019	Desiree Golen	Desiree Golen				5/14/2009	Notes re: teleconference with Jeffrey C. Neu	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XIO-MB-0008181	Desiree Golen	Mario Balibrera				11/17/2009	Email re: retention of counsel	Attorney-client privilege (Fed. R. Evid. 502(g)(1)
XIO-MB-0008182	Mario Balibrera	Desiree Golen				11/17/2009	Email re: retention of counsel	Attorney-client privilege (Fed. R. Evid. 502(g)(1)

LEGEND:

Counsels' names in **bold**.

Attorney-Client Privilege;

Attorney Work-Product.

AMENDED PRIVILEGE LOG

XIO INTERACTIVE, INC.

ID NUMBER	AUTHOR	RECIPIENT	CC	BCC	ADD'L RECIPIENTS	DATE	DOCUMENT DESCRIPTION	PRIVILEGE CLAIMED
XIO-MH-0039077-78	Desiree Golen	xiointeractive@googlegroups.com				12/21/2009	Email re: status, document retention issues and pending tasks for meeting with attorney	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2)
XIO-MH-0039117-18	Michael Carter	xiointeractive@googlegroups.com				12/21/2009	Email re: status, document retention issues and pending tasks for meeting with attorney	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2)
XIO-MH-0039119	Jacob Rus	xiointeractive@googlegroups.com				12/21/2009	Email re: status, document retention issues and pending tasks for meeting with attorney	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2)
XIO-MH-0039124	Mario Balibrera d	xiointeractive@googlegroups.com				12/21/2009	Email re: status, document retention issues and pending tasks for meeting with attorney	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2)
XIO-MH-0040651	Desiree Golen	Michael Carter; Martin Hunt; Jacob Rus	Jacob Rus			1/10/2010	Email re: litigation strategy and document retention instructions	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2)
XXX-PRIV-XXX-XIO-DG-0100022	Richard C. Litman	Desiree Golen				10/29/2008	Email re: patentability of invention	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XXX-PRIV-XXX-XIO-DG-0100029-30	Maura Carter	Jeffrey C. Neu				11/6/2008	Email re: potential representation	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation

LEGEND:

Counsel's names in **bold**.

Attorney-Client Privilege;

Attorney Work-Product.

AMENDED PRIVILEGE LOG

XIO INTERACTIVE, INC.

ID NUMBER	AUTHOR	RECIPIENT	CC	BCC	ADD'L RECIPIENTS	DATE	DOCUMENT DESCRIPTION	PRIVILEGE CLAIMED
XXX-PRIV-XXX-XIO-DG-0100031	Jeffrey C. Neu	Maura Carter; Desiree Golen				11/6/2008	Email re potential representation	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XXX-PRIV-XXX-XIO-DG-0100049-53	Desiree Golen	Jeffrey C. Neu				11/8/2008	Email re: potential representation	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XXX-PRIV-XXX-XIO-DG-0100059	Jeffrey C. Neu	Desiree Golen				11/10/2008	Email re potential representation	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XXX-PRIV-XXX-XIO-DG-0100060-66	Desiree Golen	Jeffrey C. Neu				11/10/2008	Email re: potential representation	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XXX-PRIV-XXX-XIO-DG-0100067	Desiree Golen	Jeffrey C. Neu				11/10/2008	Email re: potential representation	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XXX-PRIV-XXX-XIO-DG-0100068	Desiree Golen	Jeffrey C. Neu				11/10/2008	Email re: potential representation	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XXX-PRIV-XXX-XIO-DG-0100069-75	Desiree Golen	Jeffrey C. Neu				11/11/2008	Email re: potential representation	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation

LEGEND:

Counsels' names in **bold**.

Attorney-Client Privilege;
 Attorney Work-Product.

ID NUMBER	AUTHOR	RECIPIENT	CC	BCC	ADD'L RECIPIENTS	DATE	DOCUMENT DESCRIPTION	PRIVILEGE CLAIMED
XXX-PRIV-XXX-XIO-DG-0100076	Desiree Golen	Jeffrey C. Neu				11/11/2008	Email re: potential representation	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XXX-PRIV-XXX-XIO-DG-0100077	Desiree Golen	Jeffrey C. Neu				11/11/2008	Email re: potential representation	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XXX-PRIV-XXX-XIO-DG-0100088-93	Jeffrey C. Neu	Desiree Golen				11/12/2008	Email re: analysis of information received	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XXX-PRIV-XXX-XIO-DG-0100094-100	Desiree Golen	Jeffrey C. Neu				11/12/2008	Email re: analysis of information received	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XXX-PRIV-XXX-XIO-DG-0100101-07	Jeffrey C. Neu	Desiree Golen				11/12/2008	Email re: analysis of information received	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XXX-PRIV-XXX-XIO-DG-0100108-114	Desiree Golen	Jeffrey C. Neu				11/12/2008	Email to attorney providing additional information	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XXX-PRIV-XXX-XIO-DG-0100115-121	Jeffrey C. Neu	Desiree Golen				11/12/2008	Email re: analysis of information received	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation

LEGEND:

Counsel's names in **bold**.

Attorney-Client Privilege;
 Attorney Work-Product.

ID NUMBER	AUTHOR	RECIPIENT	CC	BCC	ADD'L RECIPIENTS	DATE	DOCUMENT DESCRIPTION	PRIVILEGE CLAIMED
XXX-PRIV-XXX-XIO-DG-0100137	Desiree Golen	Jeffrey C. Neu				11/14/2008	Email to attorney providing additional information	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XXX-PRIV-XXX-XIO-DG-0100138	Desiree Golen	Jeffrey C. Neu				11/14/2008	Email to attorney following up on meeting and pending tasks	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XXX-PRIV-XXX-XIO-DG-0100139	Jeffrey C. Neu	Desiree Golen				11/15/2008	Email from attorney following up on meeting and pending tasks	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XXX-PRIV-XXX-XIO-DG-0100140	Desiree Golen	Jeffrey C. Neu				11/15/2008	Email to attorney transmitting additional information requested at meeting	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XXX-PRIV-XXX-XIO-DG-0100141	Jeffrey C. Neu	Desiree Golen				11/15/2008	Email from attorney re: additional information received subsequent to meeting	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XXX-PRIV-XXX-XIO-DG-0100142	Jeffrey C. Neu	Desiree Golen				11/15/2008	Email from attorney re: additional information received subsequent to meeting	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XXX-PRIV-XXX-XIO-DG-0100143	Desiree Golen	Jeffrey C. Neu				11/15/2008	Email to attorney transmitting additional information requested at meeting	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation

LEGEND:

Counsels' names in **bold**.

Attorney-Client Privilege;
 Attorney Work-Product.

ID NUMBER	AUTHOR	RECIPIENT	CC	BCC	ADD'L RECIPIENTS	DATE	DOCUMENT DESCRIPTION	PRIVILEGE CLAIMED
XXX-PRIV-XXX-XIO-DG-0100144	Desiree Golen	Jeffrey C. Neu				11/15/2008	Email to attorney transmitting additional information requested at meeting	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XXX-PRIV-XXX-XIO-DG-0100145		Jeffrey C. Neu	Desiree Golen			11/15/2008	Email from attorney re: additional information received subsequent to meeting	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XXX-PRIV-XXX-XIO-DG-0100146		Jeffrey C. Neu	Desiree Golen			11/15/2008	Email from attorney re: additional information received subsequent to meeting	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XXX-PRIV-XXX-XIO-DG-0100147	Desiree Golen	Jeffrey C. Neu				11/17/2008	Email to attorney transmitting additional information requested at meeting	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XXX-PRIV-XXX-XIO-DG-0100197	Desiree Golen	Jeffrey C. Neu				12/7/2008	Email to attorney re: fair use issues	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XXX-PRIV-XXX-XIO-DG-0100198		Jeffrey C. Neu	Desiree Golen			12/7/2008	Email from attorney re: fair use issues	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation
XXX-PRIV-XXX-XIO-DG-0100199-200	Desiree Golen	Jeffrey C. Neu				12/7/2008	Email to attorney re: fair use issues	Attorney-client privilege (Fed. R. Evid. 502(g)(1); work-product protection (Fed. R. Evid. 502(g)(2); prepared in anticipation of litigation

LEGEND:

Counsels' names in **bold**.

Attorney-Client Privilege;

Attorney Work-Product.

EXHIBIT H

In The Matter Of:

TETRIS HOLDING, LLC, ET AL.

v.

XIO INTERACTIVE INC.

DESIREE GOLEN - Vol. 2

February 10, 2011

MERRILL CORPORATION

LegaLink, Inc.

135 Main Street
4th Floor

San Francisco, CA 94105
Phone: 415.357.4300
Fax: 415.357.4301

DESIREE GOLEN - 2/10/2011

11:12:40 1 THE VIDEOGRAPHER: Please proceed.
 11:12:43 2 EXAMINATION BY MS. SCHMITT
 11:12:46 3 MS. SCHMITT: Q. Thank you. I'd like to mark
 11:12:48 4 as -- I'd like to introduce Exhibit 101.
 11:12:51 5 (Whereupon, Deposition Exhibit 101 was
 11:12:54 6 marked for identification.)
 11:12:59 7 MS. SCHMITT: Q. Ms. Golen, have you seen
 11:13:02 8 this document before?
 11:13:05 9 A. I believe I have.
 11:13:09 10 Q. **And your counsel has represented to us that**
 11:13:14 11 **you are verifying these interrogatory responses. Do**
 11:13:17 12 **you understand that?**
 11:13:21 13 A. Yes.
 11:13:23 14 Q. **Can you turn to the response to interrogatory**
 11:13:26 15 **number nine, which -- these pages aren't numbered,**
 11:13:28 16 **but -- the first bullet point in that response says**
 11:13:41 17 **Maura Carter. Do you see that?**
 11:13:45 18 A. I do.
 11:13:48 19 Q. **So this -- who is Paula Kasler?**
 11:13:51 20 A. Paula Kasler is an attorney that I met at a --
 11:13:53 21 kind of like a networking event in Palo Alto.
 11:13:58 22 Q. **When did you meet her?**
 11:13:60 23 A. I don't remember exactly. It was probably
 11:13:64 24 either in 2008 or 2009, yeah.
 11:13:68 25 Q. **And when's the last time you had contact with**

319

1 her?
 2 A. The last time I had contact with her was via
 3 e-mail sometime, I think, in 2009. She introduced me to
 4 a friend of hers who was a game designer.
 5 Q. **Who was that?**
 6 A. I don't exactly remember his full name. I
 7 think his -- Bernard. I think it was Bernard.
 8 Q. **Bernard Schmalzried?**
 9 A. Yes.
 10 Q. **Okay.**
 11 Julie, that's S-C-H-M-A-L-Z-R-I-E-D.
 12 And the interrogatory response provides that
 13 Xio communicated with Paula Kasler regarding the
 14 intellectual property rights of video games and
 15 Tetrimino games; is that correct?
 16 A. Yes. So at this networking event, it was just
 17 a lot of lawyers, and they were talking about what they
 18 were interested in, and I was talking a little bit about
 19 the fact that we were making a Tetrimino game. And I
 20 think I probably brought up that there were a few other
 21 Tetrimino game developers who had received cease and
 22 desist letters from the Tetris Company. So I don't
 23 exactly remember everything that we talked about, but I
 24 think I probably mentioned -- talked a little bit about
 25 intellectual property rights of video games.

320

11:13:00 1 Q. **And what did you talk about -- what did you**
 11:13:03 2 **say about the intellectual property rights of video**
 11:13:05 3 **games?**
 11:13:08 4 A. I don't remember. Again, it was, like, about
 11:13:11 5 two years ago. So, in general, what I do remember is we
 11:13:14 6 talked about them, that that subject was brought up. I
 11:13:16 7 don't remember the specifics, though.
 11:13:18 8 Q. **And other than that networking event, did you**
 11:13:21 9 **speak to Ms. Kasler about intellectual property rights**
 11:13:23 10 **after that event? Or other than that event, sorry, did**
 11:13:26 11 **you speak to Ms. Kasler about IT rights?**
 11:13:29 12 MS. MAITRA: Objection; vague.
 11:13:32 13 THE WITNESS: I don't exactly know. I'm not
 11:13:35 14 sure when all these communications happened. I know I
 11:13:38 15 met her at this networking event, and I brought up that
 11:13:41 16 we were making a Tetrimino game. And then mostly
 11:13:44 17 likely -- I think we were in a group of people -- we
 11:13:47 18 might have talked about video games, intellectual
 11:13:50 19 property rights. I think, like I said, she sent me an
 11:13:53 20 e-mail introduction to someone else. So she might have
 11:13:56 21 asked for like a status of where we were, and I'm not
 11:13:59 22 sure exactly what I -- any of our communications beyond
 11:13:62 23 that.
 11:13:65 24 MS. SCHMITT: Q. Okay. So other than the
 11:13:68 25 e-mail that you referenced and then this networking

321

1 event, you can't recall any other communications with
 2 her?

3 A. Yeah, to the best of my knowledge, I can't
 4 recall anything else.

5 Q. **And the networking event was an affair with**
 6 **many people in attendance?**

7 MS. MAITRA: Objection; vague.

8 THE WITNESS: Yes, it was a -- it was just, I
 9 think, a firm's opening party. They were launching, and
 10 I was invited.

11 MS. SCHMITT: Q. Okay. And how long did you
 12 speak to Ms. Kasler at that event?

13 A. I don't recall exactly. We talked about other
 14 things; her daughter and, you know, I think education.
 15 So I'd say maybe an hour or so.

16 Q. **Did Ms. Kasler work for a law firm?**

17 A. I believe she did.

18 Q. **What was the name of her law firm?**

19 A. I don't recall.

20 Q. **And did you retain Ms. Kasler?**

21 A. No.

22 Q. **And did you show her the Mino game?**

23 A. No, I don't believe we did. I don't think at
 24 that time we even had a Mino game.

25 Q. **Did you show her any prototype of a Mino**

322

Pages 319 to 322

Merrill Corporation - San Francisco

800-869-9132

www.merrillcorp.com/law

DESIREE GOLEN - 2/10/2011

<p>1 game?</p> <p>2 A. I don't believe so. I don't remember what I</p> <p>3 brought with me to that networking event. Most likely I</p> <p>4 had a few business cards, and, you know, I didn't really</p> <p>5 carry much around. So I think I probably just came with</p> <p>6 myself and conversation.</p> <p>7 Q. So other than maybe a business card, you</p> <p>8 didn't show Ms. Kasler any materials; is that correct?</p> <p>9 A. Not that I can recall.</p> <p>10 Q. Okay. Did you discuss the Customs opinion</p> <p>11 with her? And when I say "Customs opinion," I mean the</p> <p>12 Customs opinion that was marked in your deposition as</p> <p>13 Exhibit 38, which had to do with Tetris and an</p> <p>14 infringing Tetris game.</p> <p>15 MS. MAITRA: So are you going to show us the</p> <p>16 Customs decision?</p> <p>17 MS. SCHMITT: Sure, if you don't remember it.</p> <p>18 Frank, please show it to them.</p> <p>19 MR. CARLOW: Sure.</p> <p>20 MS. MAITRA: Is this Exhibit 2 to this?</p> <p>21 MS. SCHMITT: No. Well, this was marked as</p> <p>22 Exhibit 38 in Ms. Golen's -- it's already been marked.</p> <p>23 We just don't have the marked copy back.</p> <p>24 MS. MAITRA: Sorry, the interrogatory was</p> <p>25 Exhibit 1?</p>	<p>1 MR. CARLOW: 101.</p> <p>2 MS. MAITRA: Okay.</p> <p>3 THE WITNESS: I'm sorry, what was your</p> <p>4 question?</p> <p>5 MS. SCHMITT: Q. Did you discuss this Customs</p> <p>6 decision with Ms. Kasler?</p> <p>7 A. I don't believe I did. I don't remember when</p> <p>8 the networking event was, and I don't remember when I</p> <p>9 read this exactly, and I don't think I would have talked</p> <p>10 to her about it. She wasn't an IP attorney. It was</p> <p>11 mostly just a good person who I met.</p> <p>12 Q. Did she -- did she say that she thought your</p> <p>13 game would not infringe on my client's rights in the</p> <p>14 Tetris game?</p> <p>15 A. I don't believe we talked about any specific</p> <p>16 questions like that. Again, we -- I think I might have</p> <p>17 mentioned that I was doing a Tetrimino game, and we</p> <p>18 might have talked a little bit about video game</p> <p>19 intellectual property rights, but she wasn't an IP</p> <p>20 lawyer, so we talked about other things.</p> <p>21 Q. Okay. And who is Sean DeBruine?</p> <p>22 A. Sean DeBruine is another lawyer that I met at</p> <p>23 that networking event, and I found out in passing that</p> <p>24 he worked on the Lotus versus Borland case. So I got</p> <p>25 really excited. I remember I think I had read that case</p>
<p>323</p> <p>1 a few nights before, and I was super excited to meet</p> <p>2 someone on the case.</p> <p>3 Q. Did the Lotus v. Borland case have to do with</p> <p>4 video games?</p> <p>5 A. You know, it's been a long time since I read</p> <p>6 that case and kind of came to -- made a strong analysis</p> <p>7 of it in my own head. So I don't actually remember the</p> <p>8 specifics of that case at all. I think it was about two</p> <p>9 years ago that I read it for the first time.</p> <p>10 Q. And Sean, I'm sorry DeBruine is how you</p> <p>11 pronounce his name?</p> <p>12 A. I think so.</p> <p>13 Q. Okay. And you met him at the same networking</p> <p>14 event that you met Ms. Kasler?</p> <p>15 A. That's correct.</p> <p>16 Q. And other than that networking event, did you</p> <p>17 have any contact with Mr. DeBruine?</p> <p>18 A. I think we kept in contact via e-mail a few</p> <p>19 times, and we went out to lunch another time. And,</p> <p>20 again, with a lot of these lawyers, they would check in</p> <p>21 with me and ask for a status update, and, occasionally,</p> <p>22 I would just tell them what was going on.</p> <p>23 Q. What -- did Mr. DeBruine work for a firm?</p> <p>24 A. Yeah, he worked -- he did work for a firm. I</p> <p>25 don't remember the name of that firm off the top of my</p>	<p>324</p> <p>1 head.</p> <p>2 Q. Did you show Mr. DeBruine Mino?</p> <p>3 A. I don't remember exactly. I probably didn't</p> <p>4 at that first networking event because I don't think we</p> <p>5 had Mino. And then I don't -- I don't believe I showed</p> <p>6 him Mino. It's possible -- it's possible that I might</p> <p>7 have sent a promo code to a few of these people, but I</p> <p>8 don't -- I don't recall off the top of my head.</p> <p>9 Q. But you don't recall showing Mr. DeBruine</p> <p>10 Mino before it was launched on the iTunes Store?</p> <p>11 A. I don't remember. I don't remember when we</p> <p>12 met for lunch, and I don't remember how that kind of</p> <p>13 comes into the timeline of when we launched. And I</p> <p>14 don't -- I don't specifically remember showing him Mino.</p> <p>15 Q. Did you show Mr. DeBruine any of the games</p> <p>16 called Tetris?</p> <p>17 A. By "show," what exactly do you mean?</p> <p>18 Q. Sent him a video clip of gameplay, show him</p> <p>19 screenshots from a game, show him an actual game on</p> <p>20 your computer or his computer, something like that.</p> <p>21 A. Can you repeat the question?</p> <p>22 Q. Yeah.</p> <p>23 Can you repeat the question, Julie?</p> <p>24 (Record read as follows:</p> <p>25 Q. Did you show Mr. DeBruine any</p> <p>of the games called Tetris?)</p>

DESIREE GOLEN - 2/10/2011

11:25:04
11:25:06
11:25:12
11:25:15
11:25:19
11:25:21
11:25:25
11:25:26
11:25:28
11:25:30
11:25:32
11:25:33
11:25:35
11:25:37
11:25:41
11:25:44
11:25:47
11:25:50
11:25:53
11:25:55
11:25:57
11:25:59
11:26:02
11:26:04
11:26:06
11:26:08
11:26:10
11:26:12
11:26:14
11:26:16
11:26:18
11:26:20
11:26:22
11:26:24
11:26:26
11:26:28

1 THE WITNESS: I don't think I showed him any
2 games called Tetris. Again, I don't really remember off
3 the top of my head. I think most of our conversations
4 were kind of academic.

5 MS. SCHMITT: Q. And before Mino was launched
6 on the App Store, did Mr. DeBruine tell you that he
7 thought it did not infringe my client's rights in
8 Tetris?

9 A. So I don't recall exactly what he said, and I
10 think there's a lot of legal terms in there that I don't
11 completely understand. I'm not a lawyer. And again, it
12 was a long time ago, but the purpose of meeting with
13 these lawyers was kind of to solidify my understanding
14 of copyright at that time, which, again, is the same as
15 my understanding now, which is that, you know, you can
16 use ideas, functional elements, and game rules of a
17 game --

18 Q. Okay. Thank you. Did you show him any
19 games?

20 A. I don't -- I don't recall.

21 Q. Okay. Did he give you an opinion letter that
22 instructed you that it was okay to proceed with Mino
23 before it was launched on the iTunes App Store?

24 A. Um, I don't recall. I don't even really know
25 what an opinion letter is, and I don't think I requested

1 an opinion letter. I think that that's the first time
2 I've kind of heard that term. So I don't think he sent
3 me something called an opinion letter.

4 Q. Did you discuss the Customs decision with
5 Mr. DeBruine before Mino's launch on the App Store?

6 A. I don't recall.

7 Q. And just going back to Ms. Kasler, did she
8 ever give you a formal opinion letter telling you that
9 it was okay to proceed with Mino before it was launched
10 on the App Store?

11 A. Again, I don't really know what an opinion --
12 a formal opinion letter is, and she never sent me a
13 document entitled a formal opinion Letter. And
14 furthermore, she was more of a friend. She wasn't an
15 intellectual property attorney. She was someone I met
16 in passing and really enjoyed her company.

17 Q. And Mr. DeBruine, did he send you any written
18 communication that said it was okay to proceed with
19 Mino before it was launched on the iTunes Store?

20 MS. MAITRA: Objection; vague.

21 THE WITNESS: Are you saying did he write an
22 opinion letter?

23 MS. SCHMITT: Q. I'm -- since you don't
24 understand what an opinion letter means, I'm taking that
25 off the table. I'm saying did Mr. DeBruine ever tell

328

11:26:28
11:26:29
11:26:32
11:26:35
11:26:38
11:26:40
11:26:42
11:26:44
11:26:46
11:26:48
11:26:50
11:26:52
11:26:54
11:26:56
11:26:58
11:26:60
11:26:62
11:26:64
11:26:66
11:26:68
11:26:70
11:26:72
11:26:74
11:26:76
11:26:78
11:26:80
11:26:82
11:26:84
11:26:86
11:26:88
11:26:90
11:26:92
11:26:94
11:26:96
11:26:98
11:26:100
11:26:102
11:26:104
11:26:106
11:26:108
11:26:110
11:26:112
11:26:114
11:26:116
11:26:118
11:26:120
11:26:122
11:26:124
11:26:126
11:26:128
11:26:130
11:26:132
11:26:134
11:26:136
11:26:138
11:26:140
11:26:142
11:26:144
11:26:146
11:26:148
11:26:150
11:26:152
11:26:154
11:26:156
11:26:158
11:26:160
11:26:162
11:26:164
11:26:166
11:26:168
11:26:170
11:26:172
11:26:174
11:26:176
11:26:178
11:26:180
11:26:182
11:26:184
11:26:186
11:26:188
11:26:190
11:26:192
11:26:194
11:26:196
11:26:198
11:26:200
11:26:202
11:26:204
11:26:206
11:26:208
11:26:210
11:26:212
11:26:214
11:26:216
11:26:218
11:26:220
11:26:222
11:26:224
11:26:226
11:26:228
11:26:230
11:26:232
11:26:234
11:26:236
11:26:238
11:26:240
11:26:242
11:26:244
11:26:246
11:26:248
11:26:250
11:26:252
11:26:254
11:26:256
11:26:258
11:26:260
11:26:262
11:26:264
11:26:266
11:26:268
11:26:270
11:26:272
11:26:274
11:26:276
11:26:278
11:26:280
11:26:282
11:26:284
11:26:286
11:26:288
11:26:290
11:26:292
11:26:294
11:26:296
11:26:298
11:26:300
11:26:302
11:26:304
11:26:306
11:26:308
11:26:310
11:26:312
11:26:314
11:26:316
11:26:318
11:26:320
11:26:322
11:26:324
11:26:326
11:26:328
11:26:330
11:26:332
11:26:334
11:26:336
11:26:338
11:26:340
11:26:342
11:26:344
11:26:346
11:26:348
11:26:350
11:26:352
11:26:354
11:26:356
11:26:358
11:26:360
11:26:362
11:26:364
11:26:366
11:26:368
11:26:370
11:26:372
11:26:374
11:26:376
11:26:378
11:26:380
11:26:382
11:26:384
11:26:386
11:26:388
11:26:390
11:26:392
11:26:394
11:26:396
11:26:398
11:26:400
11:26:402
11:26:404
11:26:406
11:26:408
11:26:410
11:26:412
11:26:414
11:26:416
11:26:418
11:26:420
11:26:422
11:26:424
11:26:426
11:26:428
11:26:430
11:26:432
11:26:434
11:26:436
11:26:438
11:26:440
11:26:442
11:26:444
11:26:446
11:26:448
11:26:450
11:26:452
11:26:454
11:26:456
11:26:458
11:26:460
11:26:462
11:26:464
11:26:466
11:26:468
11:26:470
11:26:472
11:26:474
11:26:476
11:26:478
11:26:480
11:26:482
11:26:484
11:26:486
11:26:488
11:26:490
11:26:492
11:26:494
11:26:496
11:26:498
11:26:500
11:26:502
11:26:504
11:26:506
11:26:508
11:26:510
11:26:512
11:26:514
11:26:516
11:26:518
11:26:520
11:26:522
11:26:524
11:26:526
11:26:528
11:26:530
11:26:532
11:26:534
11:26:536
11:26:538
11:26:540
11:26:542
11:26:544
11:26:546
11:26:548
11:26:550
11:26:552
11:26:554
11:26:556
11:26:558
11:26:560
11:26:562
11:26:564
11:26:566
11:26:568
11:26:570
11:26:572
11:26:574
11:26:576
11:26:578
11:26:580
11:26:582
11:26:584
11:26:586
11:26:588
11:26:590
11:26:592
11:26:594
11:26:596
11:26:598
11:26:600
11:26:602
11:26:604
11:26:606
11:26:608
11:26:610
11:26:612
11:26:614
11:26:616
11:26:618
11:26:620
11:26:622
11:26:624
11:26:626
11:26:628
11:26:630
11:26:632
11:26:634
11:26:636
11:26:638
11:26:640
11:26:642
11:26:644
11:26:646
11:26:648
11:26:650
11:26:652
11:26:654
11:26:656
11:26:658
11:26:660
11:26:662
11:26:664
11:26:666
11:26:668
11:26:670
11:26:672
11:26:674
11:26:676
11:26:678
11:26:680
11:26:682
11:26:684
11:26:686
11:26:688
11:26:690
11:26:692
11:26:694
11:26:696
11:26:698
11:26:700
11:26:702
11:26:704
11:26:706
11:26:708
11:26:710
11:26:712
11:26:714
11:26:716
11:26:718
11:26:720
11:26:722
11:26:724
11:26:726
11:26:728
11:26:730
11:26:732
11:26:734
11:26:736
11:26:738
11:26:740
11:26:742
11:26:744
11:26:746
11:26:748
11:26:750
11:26:752
11:26:754
11:26:756
11:26:758
11:26:760
11:26:762
11:26:764
11:26:766
11:26:768
11:26:770
11:26:772
11:26:774
11:26:776
11:26:778
11:26:780
11:26:782
11:26:784
11:26:786
11:26:788
11:26:790
11:26:792
11:26:794
11:26:796
11:26:798
11:26:800
11:26:802
11:26:804
11:26:806
11:26:808
11:26:810
11:26:812
11:26:814
11:26:816
11:26:818
11:26:820
11:26:822
11:26:824
11:26:826
11:26:828
11:26:830
11:26:832
11:26:834
11:26:836
11:26:838
11:26:840
11:26:842
11:26:844
11:26:846
11:26:848
11:26:850
11:26:852
11:26:854
11:26:856
11:26:858
11:26:860
11:26:862
11:26:864
11:26:866
11:26:868
11:26:870
11:26:872
11:26:874
11:26:876
11:26:878
11:26:880
11:26:882
11:26:884
11:26:886
11:26:888
11:26:890
11:26:892
11:26:894
11:26:896
11:26:898
11:26:900
11:26:902
11:26:904
11:26:906
11:26:908
11:26:910
11:26:912
11:26:914
11:26:916
11:26:918
11:26:920
11:26:922
11:26:924
11:26:926
11:26:928
11:26:930
11:26:932
11:26:934
11:26:936
11:26:938
11:26:940
11:26:942
11:26:944
11:26:946
11:26:948
11:26:950
11:26:952
11:26:954
11:26:956
11:26:958
11:26:960
11:26:962
11:26:964
11:26:966
11:26:968
11:26:970
11:26:972
11:26:974
11:26:976
11:26:978
11:26:980
11:26:982
11:26:984
11:26:986
11:26:988
11:26:990
11:26:992
11:26:994
11:26:996
11:26:998
11:26:1000
11:26:1002
11:26:1004
11:26:1006
11:26:1008
11:26:1010
11:26:1012
11:26:1014
11:26:1016
11:26:1018
11:26:1020
11:26:1022
11:26:1024
11:26:1026
11:26:1028
11:26:1030
11:26:1032
11:26:1034
11:26:1036
11:26:1038
11:26:1040
11:26:1042
11:26:1044
11:26:1046
11:26:1048
11:26:1050
11:26:1052
11:26:1054
11:26:1056
11:26:1058
11:26:1060
11:26:1062
11:26:1064
11:26:1066
11:26:1068
11:26:1070
11:26:1072
11:26:1074
11:26:1076
11:26:1078
11:26:1080
11:26:1082
11:26:1084
11:26:1086
11:26:1088
11:26:1090
11:26:1092
11:26:1094
11:26:1096
11:26:1098
11:26:1100
11:26:1102
11:26:1104
11:26:1106
11:26:1108
11:26:1110
11:26:1112
11:26:1114
11:26:1116
11:26:1118
11:26:1120
11:26:1122
11:26:1124
11:26:1126
11:26:1128
11:26:1130
11:26:1132
11:26:1134
11:26:1136
11:26:1138
11:26:1140
11:26:1142
11:26:1144
11:26:1146
11:26:1148
11:26:1150
11:26:1152
11:26:1154
11:26:1156
11:26:1158
11:26:1160
11:26:1162
11:26:1164
11:26:1166
11:26:1168
11:26:1170
11:26:1172
11:26:1174
11:26:1176
11:26:1178
11:26:1180
11:26:1182
11:26:1184
11:26:1186
11:26:1188
11:26:1190
11:26:1192
11:26:1194
11:26:1196
11:26:1198
11:26:1200
11:26:1202
11:26:1204
11:26:1206
11:26:1208
11:26:1210
11:26:1212
11:26:1214
11:26:1216
11:26:1218
11:26:1220
11:26:1222
11:26:1224
11:26:1226
11:26:1228
11:26:1230
11:26:1232
11:26:1234
11:26:1236
11:26:1238
11:26:1240
11:26:1242
11:26:1244
11:26:1246
11:26:1248
11:26:1250
11:26:1252
11:26:1254
11:26:1256
11:26:1258
11:26:1260
11:26:1262
11:26:1264
11:26:1266
11:26:1268
11:26:1270
11:26:1272
11:26:1274
11:26:1276
11:26:1278
11:26:1280
11:26:1282
11:26:1284
11:26:1286
11:26:1288
11:26:1290
11:26:1292
11:26:1294
11:26:1296
11:26:1298
11:26:1300
11:26:1302
11:26:1304
11:26:1306
11:26:1308
11:26:1310
11:26:1312
11:26:1314
11:26:1316
11:26:1318
11:26:1320
11:26:1322
11:26:1324
11:26:1326
11:26:1328
11:26:1330
11:26:1332
11:26:1334
11:26:1336
11:26:1338
11:26:1340
11:26:1342
11:26:1344
11:26:1346
11:26:1348
11:26:1350
11:26:1352
11:26:1354
11:26:1356
11:26:1358
11:26:1360
11:26:1362
11:26:1364
11:26:1366
11:26:1368
11:26:1370
11:26:1372
11:26:1374
11:26:1376
11:26:1378
11:26:1380
11:26:1382
11:26:1384
11:26:1386
11:26:1388
11:26:1390
11:26:1392
11:26:1394
11:26:1396
11:26:1398
11:26:1400
11:26:1402
11:26:1404
11:26:1406
11:26:1408
11:26:1410
11:26:1412
11:26:1414
11:26:1416
11:26:1418
11:26:1420
11:26:1422
11:26:1424
11:26:1426
11:26:1428
11:26:1430
11:26:1432
11:26:1434
11:26:1436
11:26:1438
11:26:1440
11:26:1442
11:26:1444
11:26:1446
11:26:1448
11:26:1450
11:26:1452
11:26:1454
11:26:1456
11:26:1458
11:26:1460
11:26:1462
11:26:1464
11:26:1466
11:26:1468
11:26:1470
11:26:1472
11:26:1474
11:26:1476
11:26:1478
11:26:1480
11:26:1482
11:26:1484
11:26:1486
11:26:1488
11:26:1490
11:26:1492
11:26:1494
11:26:1496
11:26:1498
11:26:1500
11:26:1502
11:26:1504
11:26:1506
11:26:1508
11:26:1510
11:26:1512
11:26:1514
11:26:1516
11:26:1518
11:26:1520
11:26:1522
11:26:1524
11:26:1526
11:26:1528
11:26:1530
11:26:1532
11:26:1534
11:26:1536
11:26:1538
11:26:1540
11:26:1542
11:26:1544
11:26:1546
11:26:1548
11:26:1550
11:26:1552
11:26:1554
11:26:1556
11:26:1558
11:26:1560
11:26:1562
11:26:1564
11:26:1566
11:26:1568
11:26:1570
11:26:1572
11:26:1574
11:26:1576
11:26:1578
11:26:1580
11:26:1582
11:26:1584
11:26:1586
11:26:1588
11:26:1590
11:26:1592
11:26:1594
11:26:1596
11:26:1598
11:26:1600
11:26:1602
11:26:1604
11:26:1606
11:26:1608
11:26:1610
11:26:1612
11:26:1614
11:26:1616
11:26:1618
11:26:1620
11:26:1622
11:26:1624
11:26:1626
11:26:1628
11:26:1630
11:26:1632
11:26:1634
11:26:1636
11:26:1638
11:26:1640
11:26:1642
11:26:1644
11:26:1646
11:26:1648
11:26:1650
11:26:1652
11:26:1654
11:26:1656
11:26:1658
11:26:1660
11:26:1662
11:26:1664
11:26:1666
11:26:1668
11:26:1670
11:26:1672
11:26:1674
11:26:1676
11:26:1678
11:26:1680
11:26:1682
11:26:1684
11:26:1686
11:26:1688
11:26:1690
11:26:1692
11:26:1694
11:26:1696
11:26:1698
11:26:1700
11:26:1702
11:26:1704
11:26:1706
11:26:1708
11:26:1710
11:26:1712
11:26:1714
11:26:1716
11:26:1718
11:26:1720
11:26:1722
11:26:1724
11:26:1726
11:26:1728
11:26:1730
11:26:1732
11:26:1734
11:26:1736
11:26:1738
11:26:1740
11:26:1742
11:26:1744
11:26:1746
11

DESIREE GOLEN - 2/10/2011

11:29:13 1 A. By this time -- (conference room phone rings.)
 11:29:21 2 MS. MAITRA: It's not here.
 11:29:23 3 MS. SCHMITT: No, no. it's here, sorry.
 11:29:24 4 Somebody just walked in the room.
 11:29:26 5 Anyway, I'm sorry, could we -- could we --
 11:29:27 6 could you read back my last question? It was a little
 11:29:28 7 distracting.
 11:29:28 8 (Record read as follows:
 11:30:52 9 Q. But it was after you had
 11:29:34 10 decided to create Mino, correct?)
 11:29:36 11 THE WITNESS: Yes, I think that's fair to say.
 11:29:40 12 MS. SCHMITT: Q. And it was before Mino was
 11:29:44 13 launched, correct?
 11:29:44 14 A. I don't know.
 11:29:46 15 **Q. Okay. Did you produce the e-mail between --**
 11:29:48 16 **the e-mail correspondence between you and Professor**
 11:29:50 17 **Samuelson?**
 11:29:53 18 A. I turned over my Google account to my lawyers
 11:30:00 19 for production. So anything related to Xio Interactive
 11:30:04 20 should have been produced.
 11:30:05 21 **Q. And did Professor Samuelson -- did you show**
 11:30:08 22 **Professor Samuelson Mino?**
 11:30:14 23 A. When you say "show," again, are you talking
 11:30:18 24 about a screenshot, a video?
 11:30:22 25 **Q. In any way, sending her screenshots, sending**
 11:30:26 26 **her videos, sending her a link, sending her a copy of**

331

1 **the game, anything.**
 2 A. I don't recall exactly.
 3 **Q. Did you send her any materials about Mino?**
 4 A. I don't know.
 5 **Q. Do you have any reason to believe you did?**
 6 A. Again, I had a lot of content that I was kind
 7 of juggling, and when I was reaching out to people, I
 8 would send some things their way and others not. So I
 9 don't know what I would have sent to whom and when and
 10 why.
 11 **Q. Who on this list do you recall sending images**
 12 **of Mino to?**
 13 MS. MAITRA: And for the record, you're
 14 referring to the further supplemental response to
 15 interrogatory number nine, correct?
 16 MS. SCHMITT: Yes.
 17 THE WITNESS: Let's see. Sorry, was that
 18 screenshots of Mino?
 19 MS. SCHMITT: Q. Anything. Screenshots,
 20 video clips, a copy of the game, sketches of the
 21 prototype. I mean any -- anything you're showing about
 22 Mino, who did you send materials like that to?
 23 A. So do you want to just go through the list?
 24 **Q. Sure.**
 25 A. Okay. So Maura Carter, I think at one point

332

11:33:48 1 she mentioned that she had downloaded Mino off the App
 11:33:52 2 Store. So I think she had a copy of Mino. I'm not sure
 11:33:59 3 about Julie Turner. I think I might have sent her a
 11:33:25 4 promo code.
 11:33:26 5 **Q. Okay. All right. What I'm interested in is**
 11:33:30 6 **before Mino was launched on the iTunes Store.**
 11:33:38 7 A. Okay.
 11:33:42 8 **Q. So if people got a copy once it was on the**
 11:33:49 9 **iTunes store, I'm not interested in that. Who did you**
 11:33:55 10 **show Mino to before it was launched?**
 11:33:59 11 A. I actually don't really remember. All this
 11:34:02 12 happened a long time ago, and I don't recall exactly.
 11:34:08 13 **Q. So is there anybody on this list that you**
 11:34:08 14 **remember sending Mino to?**
 11:34:08 15 MS. MAITRA: And objection. You mean before
 11:34:40 16 Mino was launched, correct?
 11:34:42 17 MS. SCHMITT: Correct.
 11:34:48 18 THE WITNESS: Before Mino was launched, I
 11:34:51 19 don't recall. Again, it's probably in my e-mail. It is
 11:34:59 20 in my e-mail if I sent them anything. And I remember
 11:34:59 21 reviewing my e-mails in order to write this up, but it's
 11:34:59 22 been a few weeks since I wrote this, and I don't recall
 11:34:59 23 exactly.
 11:34:42 24 MS. SCHMITT: Q. So what you're saying is you
 11:34:45 25 don't recall anyone now. If you did send any materials

333

1 about Mino to these people before Mino was launched, it
 2 would be reflected in your e-mails, and those would have
 3 been produced to us?
 4 A. I believe that's what I'm saying.
 5 **Q. Who is Joshua Cook?**
 6 A. Joshua Cook is another -- I think he's an
 7 intellectual property lawyer. Oh, no, Joshua is a
 8 corporate lawyer that I met at a networking event, and
 9 he ended up introducing me to Colin D. Chapman.
 10 **Q. And was this networking event the same**
 11 **networking event that you met Mr. DeBruine and**
 12 **Ms. Kasler?**
 13 A. No.
 14 **Q. When was this networking event that you met**
 15 **Mr. Cook?**
 16 A. I don't remember exactly. I know it was after
 17 the first networking event that I met Paula and Sean. I
 18 don't remember exactly when it was other than it was
 19 after that one.
 20 **Q. Approximately how long after?**
 21 A. I have almost no idea. Maybe between one to
 22 four months. Maybe more.
 23 **Q. Was it -- was this networking event before**
 24 **Mino was launched?**
 25 A. I don't remember.

334

Pages 331 to 334

Merrill Corporation - San Francisco

800-869-9132

www.merrillcorp.com/law

DESIREE GOLEN - 2/10/2011

<p>1 Q. Other than meeting him at the networking 2 event, did you have further communications with 3 Mr. Cook?</p> <p>4 A. Yeah, I think he put me in touch with his -- 5 his firm's intellectual property lawyer, Colin D. 6 Chapman, and the three of us met sometime after that 7 initial networking event.</p> <p>8 Q. And what was the firm?</p> <p>9 A. It's on the tip -- I don't remember the name 10 of the firm. If I heard it, I could probably recognize 11 it, though.</p> <p>12 Q. Did anyone at -- did you -- sorry, excuse me. 13 Let me start again.</p> <p>14 Did you retain Mr. Cook's firm to represent 15 you or Xio?</p> <p>16 A. We didn't sign a retainer agreement with 17 Joshua Cook or Colin D. Chapman or their firm.</p> <p>18 Q. Did anyone at that firm, including Mr. Cook 19 and Mr. Chapman, tell you that Mino would not infringe 20 anyone's rights before it was launched on the App 21 Store?</p> <p>22 A. I don't exactly remember what they told me 23 specifically, but, again, I was meeting with these 24 lawyers to solidify my understanding of copyright and 25 video gaming and our work with Mino. So I do remember</p>	<p>1 that I came out with the understanding that we could 2 produce our own game natively in-house with our own 3 source code, music files, graphic files, and that that 4 was perfectly legal.</p> <p>5 Q. But you did not show Mr. Cook, Mr. Chapman, 6 or anyone else at their firm any images of your work on 7 Mino, correct?</p> <p>8 A. I don't remember if I did or if I didn't. I 9 just don't remember.</p> <p>10 Q. And you didn't show Mr. Cook or Mr. Chapman 11 or anyone else at their firm any games called Tetris; 12 is that correct?</p> <p>13 A. Again, I don't remember what I showed them 14 specifically.</p> <p>15 Q. Do you have any reason to believe that you 16 showed them any images from a game called Tetris?</p> <p>17 A. There was at one point a -- there was a 18 screenshot. There were two images of -- if you do a 19 Google search, I think there's a screenshot for Tris and 20 EA's iPhone game called Tetris, and I think I might have 21 brought that up. I don't know exactly because I 22 remember studying that image, but that's the only thing 23 I can think of if I did bring that up. I might have 24 told them to reference that.</p> <p>25 Q. When did -- you said you studied that image</p>
	<p>335</p> <p>336</p> <p>1 you found on Google?</p> <p>2 A. I think I brought it up and I looked at it, 3 yeah.</p> <p>4 Q. And when did you look at that?</p> <p>5 A. I don't remember exactly. I think there's --</p> <p>6 Q. Was it before the launch of -- it was before 7 the launch of Mino?</p> <p>8 A. I think so. I think it was before the launch 9 of Mino.</p> <p>10 Q. And did you show that EA Tetris screenshot to 11 anyone on this list in interrogatory number nine?</p> <p>12 A. I don't remember exactly. I just remember 13 that was an image. I think Michael drew up a document 14 called Tetris Company Legal Notes, or something like 15 that, and I think he might have used that screenshot in 16 there as well. So I know that was -- that was something 17 that we were kind of looking at, and we might have shown 18 people at some point. So we might not have. I just 19 don't remember who we did and didn't, and when we 20 actually game into possession of that.</p> <p>21 Q. Can you remember showing -- okay. My 22 question was can you remember showing anyone on this 23 list in interrogatory number nine the screenshot from 24 EA's Tetris game?</p> <p>25 A. I don't -- I don't remember specifically, but</p>

DESIREE GOLEN - 2/10/2011

11:40:04
11:42:54
11:42:56
11:40:58
11:42:59
11:42:100
11:42:103
11:42:106
11:42:109
11:42:110
11:42:116
11:42:21
11:42:25
11:42:29
11:42:30
11:42:30
11:42:38
11:42:47
11:42:44
11:42:50
11:42:58
11:43:02
11:43:58
11:43:59
11:43:10
11:43:64
11:43:17

1 1 Ms. Turner give you -- or let me start again.
2 Did Ms. Turner ever tell you before Mino was
3 launched that it would not infringe anyone's rights?
4 MS. MAITRA: Objection; vague.
5 THE WITNESS: Again, when I was meeting with
6 these lawyers, the purpose was to solidify my
7 understanding of copyright and video games. I don't
8 remember specifically what she told me or what we talked
9 about. But in, in general, I remember that I came out
10 of these meetings with the understanding that we could
11 produce a game with our own native source code, image
12 files, music files, graphic files, and that would be
13 legal.
14 MS. SCHMITT: Q. I don't think you answered
15 my question.
16 Julie, would you mind reading it back, please.
17 (Record read as follows:
18 Q. Did Ms. Turner ever tell you
before Mino was launched that it would
not infringe anyone's rights?)
19 THE WITNESS: Anyone's rights --
20 MS. MAITRA: Sorry, same objection.
21 THE WITNESS: Okay. Can you read the question
again?
22 (Record read as follows:
23 Q. Did Ms. Turner ever tell you
before Mino was launched that it would
not infringe anyone's rights?)

1 1
2 MS. MAITRA: Same objection.
3 THE WITNESS: So again, I don't know
4 specifically what she told me. It was a long time ago,
5 and my understanding after we left was that we were in
6 the clear legally and would not have reason to believe
7 that we would be stepping on anyone's toes by making
8 Mino, and that's the understanding I had.
9 MS. SCHMITT: Q. But you don't recall -- but
10 you don't recall ever showing her Mino, right --
11 MS. MAITRA: Objection --
12 MS. SCHMITT: Q. -- before it was launched?
13 MS. MAITRA: Objection; asked and answered.
14 THE WITNESS: I don't recall.
15 MS. SCHMITT: Q. And who is Seth Schoen?
16 A. I think Seth was a representative at the
17 Electronic Frontier Foundation.
18 Q. Is he a lawyer?
19 A. I don't know if he's a lawyer.
20 Q. I'm sorry, going back to Ms. Turner, did you
21 ever discuss the Customs opinion with her?
22 A. I don't recall.
23 Q. And did you ever discuss the Customs opinion
24 with Mr. Cook, Mr. Chapman, or anyone else at their
25 firm?

339

340

11:44:59
11:45:06
11:45:08
11:45:06
11:45:08
11:45:10
11:45:12
11:45:14
11:45:16
11:45:18
11:45:20
11:45:22
11:45:24
11:45:26
11:45:28
11:45:30
11:45:32
11:45:34
11:45:36
11:45:38
11:45:40
11:45:42
11:45:44
11:45:46
11:45:48
11:45:50
11:45:52
11:45:54
11:45:56
11:45:58
11:45:60
11:45:62
11:45:64
11:45:66
11:45:68
11:45:70
11:45:72
11:45:74
11:45:76
11:45:78
11:45:80
11:45:82
11:45:84
11:45:86
11:45:88
11:45:90
11:45:92
11:45:94
11:45:96
11:45:98
11:45:100
11:45:102
11:45:104
11:45:106
11:45:108
11:45:110
11:45:112
11:45:114
11:45:116
11:45:118
11:45:120
11:45:122
11:45:124
11:45:126
11:45:128
11:45:130
11:45:132
11:45:134
11:45:136
11:45:138
11:45:140
11:45:142
11:45:144
11:45:146
11:45:148
11:45:150
11:45:152
11:45:154
11:45:156
11:45:158
11:45:160
11:45:162
11:45:164
11:45:166
11:45:168
11:45:170
11:45:172
11:45:174
11:45:176
11:45:178
11:45:180
11:45:182
11:45:184
11:45:186
11:45:188
11:45:190
11:45:192
11:45:194
11:45:196
11:45:198
11:45:200
11:45:202
11:45:204
11:45:206
11:45:208
11:45:210
11:45:212
11:45:214
11:45:216
11:45:218
11:45:220
11:45:222
11:45:224
11:45:226
11:45:228
11:45:230
11:45:232
11:45:234
11:45:236
11:45:238
11:45:240
11:45:242
11:45:244
11:45:246
11:45:248
11:45:250
11:45:252
11:45:254
11:45:256
11:45:258
11:45:260
11:45:262
11:45:264
11:45:266
11:45:268
11:45:270
11:45:272
11:45:274
11:45:276
11:45:278
11:45:280
11:45:282
11:45:284
11:45:286
11:45:288
11:45:290
11:45:292
11:45:294
11:45:296
11:45:298
11:45:300
11:45:302
11:45:304
11:45:306
11:45:308
11:45:310
11:45:312
11:45:314
11:45:316
11:45:318
11:45:320
11:45:322
11:45:324
11:45:326
11:45:328
11:45:330
11:45:332
11:45:334
11:45:336
11:45:338
11:45:340
11:45:342
11:45:344
11:45:346
11:45:348
11:45:350
11:45:352
11:45:354
11:45:356
11:45:358
11:45:360
11:45:362
11:45:364
11:45:366
11:45:368
11:45:370
11:45:372
11:45:374
11:45:376
11:45:378
11:45:380
11:45:382
11:45:384
11:45:386
11:45:388
11:45:390
11:45:392
11:45:394
11:45:396
11:45:398
11:45:400
11:45:402
11:45:404
11:45:406
11:45:408
11:45:410
11:45:412
11:45:414
11:45:416
11:45:418
11:45:420
11:45:422
11:45:424
11:45:426
11:45:428
11:45:430
11:45:432
11:45:434
11:45:436
11:45:438
11:45:440
11:45:442
11:45:444
11:45:446
11:45:448
11:45:450
11:45:452
11:45:454
11:45:456
11:45:458
11:45:460
11:45:462
11:45:464
11:45:466
11:45:468
11:45:470
11:45:472
11:45:474
11:45:476
11:45:478
11:45:480
11:45:482
11:45:484
11:45:486
11:45:488
11:45:490
11:45:492
11:45:494
11:45:496
11:45:498
11:45:500
11:45:502
11:45:504
11:45:506
11:45:508
11:45:510
11:45:512
11:45:514
11:45:516
11:45:518
11:45:520
11:45:522
11:45:524
11:45:526
11:45:528
11:45:530
11:45:532
11:45:534
11:45:536
11:45:538
11:45:540
11:45:542
11:45:544
11:45:546
11:45:548
11:45:550
11:45:552
11:45:554
11:45:556
11:45:558
11:45:560
11:45:562
11:45:564
11:45:566
11:45:568
11:45:570
11:45:572
11:45:574
11:45:576
11:45:578
11:45:580
11:45:582
11:45:584
11:45:586
11:45:588
11:45:590
11:45:592
11:45:594
11:45:596
11:45:598
11:45:600
11:45:602
11:45:604
11:45:606
11:45:608
11:45:610
11:45:612
11:45:614
11:45:616
11:45:618
11:45:620
11:45:622
11:45:624
11:45:626
11:45:628
11:45:630
11:45:632
11:45:634
11:45:636
11:45:638
11:45:640
11:45:642
11:45:644
11:45:646
11:45:648
11:45:650
11:45:652
11:45:654
11:45:656
11:45:658
11:45:660
11:45:662
11:45:664
11:45:666
11:45:668
11:45:670
11:45:672
11:45:674
11:45:676
11:45:678
11:45:680
11:45:682
11:45:684
11:45:686
11:45:688
11:45:690
11:45:692
11:45:694
11:45:696
11:45:698
11:45:700
11:45:702
11:45:704
11:45:706
11:45:708
11:45:710
11:45:712
11:45:714
11:45:716
11:45:718
11:45:720
11:45:722
11:45:724
11:45:726
11:45:728
11:45:730
11:45:732
11:45:734
11:45:736
11:45:738
11:45:740
11:45:742
11:45:744
11:45:746
11:45:748
11:45:750
11:45:752
11:45:754
11:45:756
11:45:758
11:45:760
11:45:762
11:45:764
11:45:766
11:45:768
11:45:770
11:45:772
11:45:774
11:45:776
11:45:778
11:45:780
11:45:782
11:45:784
11:45:786
11:45:788
11:45:790
11:45:792
11:45:794
11:45:796
11:45:798
11:45:800
11:45:802
11:45:804
11:45:806
11:45:808
11:45:810
11:45:812
11:45:814
11:45:816
11:45:818
11:45:820
11:45:822
11:45:824
11:45:826
11:45:828
11:45:830
11:45:832
11:45:834
11:45:836
11:45:838
11:45:840
11:45:842
11:45:844
11:45:846
11:45:848
11:45:850
11:45:852
11:45:854
11:45:856
11:45:858
11:45:860
11:45:862
11:45:864
11:45:866
11:45:868
11:45:870
11:45:872
11:45:874
11:45:876
11:45:878
11:45:880
11:45:882
11:45:884
11:45:886
11:45:888
11:45:890
11:45:892
11:45:894
11:45:896
11:45:898
11:45:900
11:45:902
11:45:904
11:45:906
11:45:908
11:45:910
11:45:912
11:45:914
11:45:916
11:45:918
11:45:920
11:45:922
11:45:924
11:45:926
11:45:928
11:45:930
11:45:932
11:45:934
11:45:936
11:45:938
11:45:940
11:45:942
11:45:944
11:45:946
11:45:948
11:45:950
11:45:952
11:45:954
11:45:956
11:45:958
11:45:960
11:45:962
11:45:964
11:45:966
11:45:968
11:45:970
11:45:972
11:45:974
11:45:976
11:45:978
11:45:980
11:45:982
11:45:984
11:45:986
11:45:988
11:45:990
11:45:992
11:45:994
11:45:996
11:45:998
11:45:1000
11:45:1002
11:45:1004
11:45:1006
11:45:1008
11:45:1010
11:45:1012
11:45:1014
11:45:1016
11:45:1018
11:45:1020
11:45:1022
11:45:1024
11:45:1026
11:45:1028
11:45:1030
11:45:1032
11:45:1034
11:45:1036
11:45:1038
11:45:1040
11:45:1042
11:45:1044
11:45:1046
11:45:1048
11:45:1050
11:45:1052
11:45:1054
11:45:1056
11:45:1058
11:45:1060
11:45:1062
11:45:1064
11:45:1066
11:45:1068
11:45:1070
11:45:1072
11:45:1074
11:45:1076
11:45:1078
11:45:1080
11:45:1082
11:45:1084
11:45:1086
11:45:1088
11:45:1090
11:45:1092
11:45:1094
11:45:1096
11:45:1098
11:45:1100
11:45:1102
11:45:1104
11:45:1106
11:45:1108
11:45:1110
11:45:1112
11:45:1114
11:45:1116
11:45:1118
11:45:1120
11:45:1122
11:45:1124
11:45:1126
11:45:1128
11:45:1130
11:45:1132
11:45:1134
11:45:1136
11:45:1138
11:45:1140
11:45:1142
11:45:1144
11:45:1146
11:45:1148
11:45:1150
11:45:1152
11:45:1154
11:45:1156
11:45:1158
11:45:1160
11:45:1162
11:45:1164
11:45:1166
11:45:1168
11:45:1170
11:45:1172
11:45:1174
11:45:1176
11:45:1178
11:45:1180
11:45:1182
11:45:1184
11:45:1186
11:45:1188
11:45:1190
11:45:1192
11:45:1194
11:45:1196
11:45:1198
11:45:1200
11:45:1202
11:45:1204
11:45:1206
11:45:1208
11:45:1210
11:45:1212
11:45:1214
11:45:1216
11:45:1218
11:45:1220
11:45:1222
11:45:1224
11:45:1226
11:45:1228
11:45:1230
11:45:1232
11:45:1234
11:45:1236
11:45:1238
11:45:1240
11:45:1242
11:45:1244
11:45:1246
11:45:1248
11:45:1250
11:45:1252
11:45:1254
11:45:1256
11:45:1258
11:45:1260
11:45:1262
11:45:1264
11:45:1266
11:45:1268
11:45:1270
11:45:1272
11:45:1274
11:45:1276
11:45:1278
11:45:1280
11:45:1282
11:45:1284
11:45:1286
11:45:1288
11:45:1290
11:45:1292
11:45:1294
11:45:1296
11:45:1298
11:45:1300
11:45:1302
11:45:1304
11:45:1306
11:45:1308
11:45:1310
11:45:1312
11:45:1314
11:45:1316
11:45:1318
11:45:1320
11:45:1322
11:45:1324
11:45:1326
11:45:1328
11:45:1330
11:45:1332
11:45:1334
11:45:1336
11:45:1338
11:45:1340
11:45:1342
11:45:1344
11:45:1346
11:45:1348
11:45:1350
11:45:1352
11:45:1354
11:45:1356
11:45:1358
11:45:1360
11:45:1362
11:45:1364
11:45:1366
11:45:1368
11:45:1370
11:45:1372
11:45:1374
11:45:1376
11:45:1378
11:45:1380
11:45:1382
11:45:1384
11:45:1386
11:45:1388
11:45:1390
11:45:1392
11:45:1394
11:45:1396
11:45:1398
11:45:1400
11:45:1402
11:45:1404
11:45:1406
11:45:1408
11:45:1410
11:45:1412
11:45:1414
11:45:1416
11:45:1418
11:45:1420
11:45:1422
11:45:1424
11:45:1426
11:45:1428
11:45:1430
11:45:1432
11:45:1434
11:45:1436
11:45:1438
11:45:1440
11:45:1442
11:45:1444
11:45:1446
11:45:1448
11:45:1450
11:45:1452
11:45:1454
11:45:1456
11:45:1458
11:45:1460
11:45:1462
11:45:1464
11:45:1466
11:45:1468
11:45:1470
11:45:1472
11:45:1474
11:45:1476
11:45:1478
11:45:1480
11:45:1482
11:45:1484
11:45:1486
11:45:1488
11:45:1490
11:45:1492
11:45:1494
11:45:1496
11:45:1498
11:45:1500
11:45:1502
11:45:1504
11:45:1506
11:45:1508
11:45:1510
11:45:1512
11:45:1514
11:45:1516
11:45:1518
11:45:1520
11:45:1522
11:45:1524
11:45:1526
11:45:1528
11:45:1530
11:45:1532
11:45:1534
11:45:1536
11:45:1538
11:45:1540
11:45:1542
11:45:1544
11:45:1546
11:45:1548
11:45:1550
11:45:1552
11:45:1554
11:45:1556
11:45:1558
11:45:1560
11:45:1562
11:45:1564
11:45:1566
11:45:1568
11:45:1570
11:45:1572
11:45:1574
11:45:1576
11:45:1578
11:45:1580
11:45:1582
11:45:1584
11:45:1586
11:45:1588
11:45:1590
11:45:1592
11:45:1594
11:45:1596
11:45:1598
11:45:1600
11:45:1602
11:45:1604
11:45:1606
11:45:1608
11:45:1610
11:45:1612
11:45:1614
11:45:1616
11:45:1618
11:45:1620
11:45:1622
11:45:1624
11:45:1626
11:45:1628
11:45:1630
11:45:1632
11:45:1634
11:45:1636
11:45:1638
11:45:1640
11:45:1642
11:45:1644
11:45:1646
11:45:1648
11:45:1650
11:45:1652
11:45:1654
11:45:1656
11:45:1658
11:45:1660
11:45:1662
11:45:1664
11:45:1666
11:45:1668
11:45:1670
11:45:1672
11:45:1674
11:45:1676
11:45:1678
11:45:1680
11:45:1682
11:45:1684
11:45:1686
11:45:1688
11:45:1690
11:45:1692
11:45:1694
11:45:1696
11:45:1698
11:45:1700
11:45:1702
11:45:1704
11:45:1706
11:45:1708
11:45:1710
11:45:1712
11:45:1714
11:45:1716
11:45:1718
11:45:1720
11:45:1722
11:45:1724
11:45:1726
11:45:1728
11:45:1730
11:45:1732
11:45:1734
11:45:1736
11:45:1738
11:45:1740
11:45:1742
11:45:1744
11:45:1746
11:45:1748
11:45:1750
11:45:1752
11:45:1754
11:45:1756
11:45:1758
11:45:1760
11:45:1762
11:45:1764
11:45:1766
11:45:1768
11:45:1770
11:45:1772
11:45:1774
11:45:1776
11:45:1778
11:45

EXHIBIT I

From: Desiree Golen

To: "DeBruine, Sean"

Cc:

Bcc:

Date: Tue, 3 Nov 2009 13:59:46 -0800

Subject: Thoughts and Feedback Please

Hi Sean,

I thought I would update you on what's been going on with our legal situation: I spoke with many attorneys after our lunch meeting last month, and am considering a pretty good arrangement with Mark Lemley's new firm, Durie Tangri Page Lemley Roberts & Kent LLP.

I am in the process of drafting a letter to the firm I am now working with to inform them that I would like to terminate our agreement and seek alternate legal representation. I have never done this before, and could use any advice you might have. I don't want to offend, but I want to be direct. Below is what I've put together so far.

If you have time, I would appreciate your thoughts.

Thank you so much for all of your help thus far!

-Desiree

Dear Jeff,

I would like to thank you for your time and effort thus far on our case with the Tetris Company. Unfortunately, we have been unsatisfied with the approach your firm would like to take on this case (namely that you would prefer not to confront the issue of the copyrightability of TETRIS game mechanics), and we would like to look for alternate legal representation more in line with our goals.

Previously you and I spoke on the phone and in person about the specifics of our arrangement: that the initial letter writing to Apple and to the Tetris Company would be completed on a pro-bono basis, and that once we progressed to a different stage (ie settlement or litigation) we would then discuss a financial plan to cover legal costs and fees.

Because we are still in the letter writing phase, Xio should not have incurred any fees with JC Neu and Associates.

XIO-DG-0100927

Thank you for your time,

Desiree Golen

Desiree Golen
CEO, Xio Interactive
Network Game Development on the Mobile Platform
xiointeractive.com
Mountain View, CA
(650) 866-5583

XIO-DG-0100928

EXHIBIT J

Custodian: **Desiree Golen**

Filename: **cormier_letter.doc**

Filetype: **application/msword**

aocormier@sbcglobal.net

Dear Mr. Cormier, esq.,

Hi, my name is Desiree Golen. I am writing because I am in the process of developing a Tetromino game to release on the iPhone platform very shortly.

Since August, however, the Tetris Company LLC has intimidated five independent iPhone Tetromino game developers into terminating their applications (Kafablo, Shaker, TetoTeto, Tris, and Touchris) by sending out cease and desist letters.

The C&D's accuse each developer of "violat(ing) the copyright in the Tetris(R) game because it is a copy of (their) client's game and was created and is being reproduced and sold on (the Appstore) without (their) client's prior permission or authorization." (see attached for full copy)

Unfortunately, the developers of Kafablo, Shaker, TetoTeto, Tris and Touchris were all legally and financially unprepared to contradict the Tetris Company's claims of infringement. So, Apple, in an attempt to avoid any legal entanglement, "encouraged" each developer to agree to remove their applications from the Appstore.

When Todd Billsorrow, the developer of Kafablo, wrote to the Tetris Company to declare non-infringement and inquire further about their licensing, (see attached), the Tetris Company referred him to a correspondence between a US Customs Agent and yourself <http://www faqs org/rulings/rulings2002HQ471487.html> and proceeded to use this letter as justification to claim that,

"As in the Philips case, the games under consideration herein presents with numerous similarities. The copyrightable features of the TETRIS game, as covered by the copyright registration, includes the downward, lateral, and rotating movements of the differently oriented four-brick playing pieces, and the shape and appearance of the four-brick playing pieces, both in the "dots" that appear within the individual bricks themselves, as well as in the configuration of the four-brick combinations comprising the playing pieces. Additional copyrighted features include: the scoring features, the feature displaying the next four-brick playing piece that will fall down the playing field matrix, the disappearance of any completed horizontal row, the subsequent consolidation of the playing pieces remaining on the playing field as a result of the downward shift into the space vacated by the disappearing row, the resulting score, the background music, the specific sounds generated as the four-brick playing pieces are rotated, and the sounds generated as a row is completed and points are earned. Further, the makeup of the playing field itself, i.e., the vertical matrix, higher than it is wide, with a base of ten individual "bricks" per horizontal row, and generally twenty individual "bricks" per vertical line, is also copyrightable expression."

I am curious what the context of this letter is, and if there are any further public archives that document your case entirely. You represented the opposition to the Tetris Company; was this dispute settled in Court?

I am also writing to ask your professional opinion about TTC's claims of copyright infringement proposed in the cease and desist letters.

My understanding is that a game concept is not copyrightable material:

"Copyright protection does not extend to any idea, system, method, device, or trademark material involved in the development, merchandising, or playing of a game. Once a game has been made public, nothing in the copyright law prevents others from developing another game based on similar principles." (US Copyright Office)

Furthermore, Reback's victory in Borland vs. Lotus has been cited to show the distinction in copyright law between the interface of a software product and its implementation, where the implementation is subject to copyright. However, the set of available operations and the mechanics of how they are activated are not copyrightable. If this extends to the "operation and mechanics" of a tetromino game, this standard should allow software developers to create original "clones" of copyrighted software products without infringing the copyright. (http://en.wikipedia.org/wiki/Lotus_v._Borland)

Finally, I found reference to the case of the Tetris and Arcade (but have had trouble locating a complete public record of the entire case) demonstrates that the game concept of Tetris is limited by the subject matter portrayed by the game. Therefore, copyright infringement happens ONLY if the second game copies the first game *identically*, or if the code is copied: "*the scope of a graphic copyright for a tile-on-grid design is necessarily limited by the common nature of (the) subject matter portrayed.*

Because of this limitation, copying in this category of products would have to be virtually identical to create even a suspicion of piratical copying."

(<http://www.faqs.org/rulings/rulings2002HQ471487.html>)

Finally, the audiovisual effects of my tetromino game (as well as those of Kafablo, Shaker, TetoTeto, Tris, and Touchris) are clearly distinct from those of Tetris. See:

<http://arstechnica.com/journals/thumbs.ars/2008/08/26/free-tetris-clone-pulled-from-itunes-app-store>
Furthermore, these games were developed completely independently with original codebase, art, and music, and contain no copyrighted material.

I have come to believe that the Tetris Company has been using its Copyright claims unjustly in order to profit from a monopoly on an unpatented game by bullying independent developers who do not know any better. I am completely appalled by this and I would like to finally see an end to the Tetris Company's unquestioned "authority" an open market for Tetromino Games!!

I am hoping that with your professional background and history with the Tetris company, you might be able to offer some more information, guidance, or encouragement to me. I realize you must be very busy, but I thought I would try emailing you.

Thank you for your time. I look forward to your response,

Desiree Golen

EXHIBIT K

Case 3:09-cv-06115-FLW-DEA Document 35-3 Filed 04/21/11 Page 55 of 82 PageID: 286
Re: Ruling Request; "Pocket Arcade 256 Games in 1" hand-held electronic LCD game; "TETRIS" (U.S. Copyright Office Registration No. PAu 1,284,318, U.S. Customs Service Recordation No. COP89-00202); ZAO Elorg.

HQ 471487 

October 25, 2001

ENF 4-02-RR:IT:IP [471487](#)  GFM

CATEGORY: 17 U.S.C. 602; Copyright

Anthony O. Cormier, Esq.

21700 Oxnard Street

Suite 1750

Woodland Hills CA 91367

RE: Ruling Request; "Pocket Arcade 256 Games in 1" hand-held electronic LCD game; "TETRIS" (U.S. Copyright Office Registration No. PAu 1,284,318, U.S. Customs Service Recordation No. COP89-00202); ZAO Elorg.

Dear Mr. Cormier:

This is in reply to your letter dated August 13, 2001, in which you request a Headquarters ruling as to whether the above-referenced hand-held LCD games constitute violations of the subject TETRIS copyright. You state that you have been instructed by your client, (Westminster Inc. of Atlanta, Georgia, the supplier of the subject LCD games), to lodge this ruling request.

FACTS:

The "Pocket Arcade 256 Games in 1" hand-held electronic LCD game under consideration herein incorporate what you have described as a "tile and grid" graphic format which allows one to play a number of games which are different in name, yet somewhat similar in play. In your request, you contend that these devices do not constitute violations of the protected TETRIS copyright because, you allege, the only similarities between the subject games and the protected works are "the use of tile-on-grid graphics" and that the artistic details of the respective graphics are "as different as the subject matter allows." In support of your contention, you have provided 10 visual screen prints from four of the five games resident within the device which are specifically featured on the game's packaging (e.g. Auto Racing, Shooting Gallery, Leap Frog, and Seek & Destroy). We noticed, however, that screen prints from the fifth game--Block Game--the game upon which

any Customs actions against the protected copyright would be based, were missing. In order to remedy this oversight, we have included below, screen

prints from the "Block Game" contained within the subject game.

Photos of visual images contained within game and outer game package of seized device

Photo of visual image contained within the genuine, protected TETRIS work

ISSUE: Whether the subject "Pocket Arcade 256 Games in 1" hand-held electronic LCD games constitute violations of the protected TETRIS copyright.

LAW AND ANALYSIS:

The role of Customs in issuing substantive decisions of copyright infringement as to imported merchandise was addressed in *The Miss America Organization v. Mattel, Inc.*, 945 F.2d 536 (2d Cir. 1991). Citing section 603 of the Copyright Act of 1976 (17 U.S.C. 603), the court recognized Customs authority to enforce the provisions of the law prohibiting importations of infringing goods. *Id.* at 538.

Also, the court acknowledged that as a result of its duties, Customs has developed expertise in determining whether merchandise does or does not infringe. *Id.* at 539. Further, the court stated that since sections 602 and 603 (17 U.S.C. 602, 603) direct the Secretary of the Treasury to enact regulations to aid in combating copyright infringement, it is implicit in these directions that the agency (Customs) would be involved in making infringement determinations. *Id.* at 541. Therefore, because the Treasury Department has been assigned the duty to enforce the copyright laws in cases where there is a reason to believe infringement exists with regard to an imported item, it follows that it is within Customs jurisdiction to take appropriate action to fulfill this duty. *Id.* at 542.

Further, Customs has some independence and autonomy in making infringement determinations regarding imported merchandise. *Id.* at 544. Accordingly, as the court stated, that there is no reason to enjoin Customs from performing its statutory duties so long as the agency proceeds in conformity with the statutory scheme. *Id.*

In such cases, under Customs regulations, the copyright owner bears the burden of proving copyright infringement. In order to prove copyright infringement, the copyright owner must show: (1) ownership of a valid copyright; and (2) copying by the creator of the imported work. *Act Young Imports, Inc. v. B and E Sales Co., Inc.*, 673 F. Supp. 672, 673 (S.D.N.Y. 1987). "Copying" can be established by showing that: (1) the claimed infringer had access to the copyright owner's work, and (2) the protected elements of the two works are substantially similar. *Levine v. McDonald's Corp.*, 735 F. Supp. 92, 95 (S.D.N.Y. 1990); see also, 3 M. Nimmer, *Nimmer On Copyright* 13.01, at 13-3 (1981) ("Nimmer").

Regarding ownership of a valid copyright, section 410(c) of the Copyright Act of 1976, as amended, states that "the certificate of a registration made before or within five years after first publication of the work shall constitute *prima facie* evidence of the validity of the copyright and of the facts stated in the certificate." 17 U.S.C. 410(c). In the present case, a valid copyright registration covering the subject copyrighted work exists.

Regarding access to the copyright owner's work, access is presumed where an item is generally available on the open market. *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946); *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090, 1092 (2d Cir. 1977). In the present case, the worldwide availability of the subject copyrighted work sufficiently establishes access.

As in most cases of copyright infringement, however the determination rests upon whether the works are "substantially similar." With regard to the issue of substantial similarity, courts often look to the two-part test for similarity as outlined in *Sid & Marty Krofft Television v. McDonald's Corp.*, 562 F.2d 1157, 1162 (9th Cir. 1977). In that case, the Ninth Circuit adopted a two-part test. The first step, labeled the "extrinsic test", requires a determination of substantial similarity between the ideas which includes an analysis of the type of artwork at issue, the materials used, the subject matter at issue, and the setting for that subject matter. The second step, labeled the "intrinsic test", involves a determination of substantial similarity between the ideas

which depends not on expert testimony or analytic dissection, but instead on the response of the ordinary lay person. That is, the determination focuses largely on whether the suspect work captures the "total concept and feel" of the copyrighted work. See, *Spectravest v. Mervyn's, Inc.*, 673 F.Supp. 1486, 6 U.S.P.Q. 2d 1135, 1138 (N.D. Cal. 1987); *Baxter v. MCA Inc.*, 812 F.2d 421,

With regard to the matter now before us, as regards the "extrinsic test" for similarity, it can clearly be established that the two items involve the same subject matter: hand-held electronic game devices containing LCD falling "brick" games.

As regards the "intrinsic test" for similarity, we note that it is not improper to engage in a side-by-side comparison of the designs in order to reach a determination on the issue of substantial similarity. *Knickerbocker Toy Co., Inc. v. Genie Toys, Inc.*, 491 F.Supp. 526, 528 (E.D. Mo. 1980). "Substantial similarity" is defined as a showing that the ordinary observer, not set out to detect the differences between two works, would be disposed to overlook the differences and regard the aesthetic appeal of the two works to be the same. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960); *In re "Rock 'n Flowers"*, C.S.D. 90-67, 24 Cust. B. & Dec. No. 23 (March 21, 1990). "Substantial similarity" is also defined as whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work. *Ideal Toy Corp. v. Fab-Lu Ltd. (Inc.)*, 360 F.2d 1021, 1022 (2d Cir. 1966); *Durham Industries, Inc. v. Tomy Corporation*, 630 F.2d 905, 912 (2d Cir. 1980).

In a case similar to the one at hand involving video game copyright infringement, *Atari, Inc. et. al. v. North American Philips Consumer Electronics Corp., et. al.*, 214 U.S.P.Q. 33 (CA 7, 1982) (hereinafter, *Philips*), the U.S. Circuit Court of Appeals for the Seventh Circuit ruled that overwhelming similarities inherent in the features of two video works, PAC-MAN and K.C. Munchkin, warranted a finding of infringement. In its decision, the court noted that the defendant not only adopted the same basic characters, but also portrayed them in a manner which made its game appear substantially similar to the protected work. As in the present case, numerous similarities, such as the relative size and shape of the characters' "bodies," the V-shaped "mouths," distinctive gobbling actions (with related appropriate sounds), the ways in which they disappeared upon being captured, similar peculiar "eye" and "leg" movements, and the role reversal and "regeneration" process present in both games were so similar that an ordinary observer could only conclude that the defendant copied the plaintiff's work.

The defendant in *Philips* pointed to a laundry list of specific differences. In response, the Court noted that although numerous differences may influence the impressions of the ordinary observer, "slight differences between a protected work and an accused work will not preclude a finding of infringement" where the works are substantially similar in other respects. *Id.* at 42; *citing Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905, 913; *see Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir.), *cert. denied*, 298 U.S. 669, 56 S. Ct. 835, 80 L. Ed. 1392 (1936). The Court further stated that "exact reproduction or near identity is not necessary to establish infringement. An infringement...includes also the various modes in which the matter of any work may be adopted, imitated, transferred, or reproduced, with more or less colorable alterations to disguise the piracy." *Id.*

In overturning the lower district court decision, the Court in *Philips* noted that the lower court "focused on certain differences in detail and seemingly ignored (or at least failed to articulate) the more obvious similarities." *Id.* at 42. It further stated that "the sine qua non of the ordinary observer test, however, is the overall similarities rather than the minute differences between the two works." *Id.*, *citing Peter Pan Fabrics*, 274 F.2d at 489.

Also, importantly, the court noted that "in order to assess the impact of certain differences, one factor to consider is the nature of the protected material and the setting in which it appears." *Philips* at 42. The Court continued:

Video games, unlike an artist's painting or even other audiovisual works, appeal to an audience that is fairly undiscriminating insofar as their concern about more subtle differences in artistic expression. The main attraction of [such] games lies in the stimulation provided by the intensity of the competition. A person who is entranced by the play of the game "would be disposed to overlook" many of the minor differences in detail and "regard their aesthetic appeal as the same." *Id.* at 43 (*citing Kroft, supra* at 1166-67 [children would view accused characters as substantially similar to the protected characters despite differences in detail]).

As in the *Philips* case, the games under consideration herein presents with numerous similarities. The copyrightable features of the TETRIS game, as covered by the copyright registration, includes the downward, lateral, and rotating movements of the differently oriented four-brick playing pieces, and the shape and appearance of the four-brick playing pieces, both in the "dots" that appear within the individual bricks themselves, as well as in the configuration of the four-brick combinations comprising the playing pieces. Additional copyrighted features include: the scoring features, the feature displaying the next four-brick playing piece that will fall down the playing field matrix, the disappearance of any completed horizontal row, the subsequent consolidation of the playing pieces remaining on the playing field as a result of the downward shift into the space vacated by the disappearing row, the resulting score, the background music, the specific sounds generated as the four-brick playing pieces are rotated, and the sounds

Case 3:09-cv-06115-FLW-DEA Document 35-3 Filed 04/21/11 Page 58 of 82 PageID: 289
generated as a row is completed and points are earned. Further, the makeup of the playing field itself, i.e., the vertical matrix, higher than it is wide, with a base of ten individual "bricks" per horizontal row, and generally twenty individual "bricks" per vertical line, is also copyrightable expression.

The "Pocket Arcade 256 Games in 1" brick game units utilize the same individual brick shapes, the same four-brick configuration playing pieces, the same rotating, lateral, and downward movements of the playing pieces, and the same sequential configuration of the various shapes of the four-brick playing pieces. The "Pocket Arcade 256 Games in 1" game uses the same depiction of the next playing piece that will fall down the playing field matrix, and also use an almost identical playing field matrix design in the height, width and layout, to that of the TETRIS game. Other similar elements include the scoring elements, the disappearing completed rows and the subsequent consolidation of the remaining incomplete rows left below, the accompanying sounds to the rotating, lateral and downward movements of the playing pieces, and the sounds that occur upon completion of a row and the earning of points. Like TETRIS, the "Pocket Arcade 256 Games in 1" brick game also ends when the playing field matrix is "filled up" with incomplete horizontal rows left on the playing field.

Despite these similarities, the requester avers that "the scope of a graphic copyright for a tile-on-grid design is necessarily limited by the common nature of (the) subject matter portrayed. Because of this limitation, copying in this category of products would have to be virtually identical to create even a suspicion of piratical copying." (Request at page 3).

Although not specifically cited, the requester appears to be espousing a view of the idea/expression model raised in cases such as *Atari, Inc. v. Amusement World, Inc.*, 547 F.Supp. 222 (D. Md. 1981) (hereinafter *Amusement World*) which presents similar, yet distinguishable issues. In that case, the court, ruling on a precursor of modern video games involving line drawings of spaceships and "asteroids," in the face of some twenty-two material similarities, declined to find infringement. Instead, the court, believing that the idea/expression dichotomy could not be kept separate, reasoned that the numerous similarities were:

"inevitable, given the requirements of the idea of a game involving a spaceship combating space rocks and given the technical demands of the medium of a video game. There are certain forms of expression that one must necessarily use in designing a video game in which a player fights his way through space rocks and enemy spaceships. The player must be able to rotate and move his craft. All the spaceships must be able to fire weapons which can destroy targets. The game must be easy at first and gradually get harder, so that bad players are not frustrated and good ones are challenged. Therefore, the rocks must move faster as the game progresses. In order for the game to look at all realistic, there must be more than one size of rock. Rocks cannot split into very many pieces, or else the screen would quickly become filled with rocks and the player would lose too quickly. All video games have characteristic sounds and symbols designed to increase the sensation of action. The player must be awarded points for destroying objects, based on the degree of difficulty involved.

All these requirements of a video game in which the player combats space rocks and spaceships combine to dictate certain forms of expression that must appear in any version of such a game. In fact, these requirements account for most of the similarities between 'Metors' and 'Asteroids.' Similarities so accounted for do not constitute copyright infringement, because they are part of plaintiff's idea and are not protected by plaintiff's copyright." *Id.* at 229. (Emphasis added).

However, Customs' position on this issue has followed that articulated by the court in *Philips* rather than that adopted by the court in *Amusement World*. Consequently, Customs does not regard the similarities noted in *Amusement World* to be "inevitable." In addition, we do not regard the enumerated features of the works considered in *Amusement World* to be "forms of expression that must appear in any version" of such a game." While such a result may once have seemed plausible, since then there has been considerable progress in digital graphic technology. In view of current technological capabilities alone, it has become clear that boundaries of expression that may have seemed fixed in the past have significantly expanded in recent years so much so as to enable creators to overcome once seemingly insurmountable technical demands, severing unintended and undesired bonds of idea and expression.

In contrasting the *Amusement World* case to the case at issue, we would first state that many other video games involve the use of square blocks on a screen in various configurations that can be manipulated by the player and that interact to score points. See *Atari Games Corp. v. Oman*, 24 U.S.P.Q. 2d 1993 (D.C. Cir. 1992) (relating to copyright registerability of BREAKOUT game). The "idea" of using simple squares or blocks on the screen to be assembled into specific shapes and manipulated by the player in a race against time or against the computer is not protectable as such. The Court in *Atari v. Oman* found the synergistic selection and arrangement of elements in a video game that (individually) may not qualify for copyright to exceed the "minimal degree of creativity" needed to bring the work within the protection of the copyright laws. *Id.* at 1936; see *Feist Publications v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282, 1289 (1991). Other games, including others contained within the imported games that do not infringe the TETRIS copyright, express the idea of using manipulable and interacting square blocks to form, among other things, race cars that move along a track and around barricades, tanks that rotate and shoot at each other or at barricades, Ping-Pong, and

"bombing" or "drop" games, as well as the BREAKOUT game discussed in *Atari v. Oman, supra*. Each of these examples clearly includes protectable expression based on the same underlying idea but does not include the expression of the TETRIS game.

As distinguished from other games which may have real life, or at least science fiction, counterparts, *Amusement World, supra*, and *Data East USA, Inc. v. Epyx, Inc.*, 9 U.S.P.Q. 2d 1332 (9th Cir. 1988) (scene-a-faire videogame featuring common depictions of Karate fighting), the TETRIS game's expression of the manipulable block configuration idea is a wholly fanciful creation, without reference to the real world. *Philips, supra* at 42. The nature of the protected material and the setting in which it appears is an important factor when comparing games in an infringement analysis. *Id.* An abstract representation is "neither an 'obvious' nor an 'inevitable' choice." *Atari v. Oman*, 24 U.S.P.Q. 2d at 1937.

While the court in *Amusement World* gave a very narrow scope of protection to the ASTEROIDS game, the court did not find that the video game lacked any protectable expression. Instead, it found that the defendant had taken only the "idea" of the game and expressed it in a different way. It found that the "overall 'feel' of the way the games play is different." *Id.* at 230. Conversely, in the instant case, the overall "feel" of the games is identical.

The *Amusement World* court recognized protectable expression in the "design features" of the ASTEROIDS game. These included "the symbols that appear on the display screen, the ways in which those symbols move around the display screen, and the sounds emanating from the game cabinet." *Id.* at 227. The court there found that the defendants used "symbols, movements, and sounds that are different from those used in plaintiff's game." *Id.* In the instant case, the imported game not only adopts the entire set of game pieces and scoring scheme of the TETRIS game, it copies nearly the entire presentation. These copied features include the size and

shape (ten blocks wide by twenty blocks high) of the playing field; the number, shape and appearance (dot inside of each square) of each game piece; the depiction along the sidelines of the next piece to appear; the scoring; and the use of very similar sounds corresponding to movements and scoring, as well as background and introductory music.

HOLDING:

The subject "Pocket Arcade 256 Games in 1" game units present with numerous features similar to those contained in the copyrighted TETRIS work. The presence of these copyrightable features in the game units would deem them substantially similar copies of the protected works which, if imported, would properly be considered clearly piratical and subject to seizure under [19 U.S.C. 1595a\(c\)\(2\)\(C\)](#) for a violation of 17 U.S.C. 602, as implemented by [19 CFR 133.42](#).

Sincerely,

Joanne Roman Stump, Chief
Intellectual Property Rights Branch

EXHIBIT L

FROM (FRI) 3.17'00 18:01/ST. 18:00/NO. 4860102434 P 3

A large, handwritten circled number '1' is positioned in the top right corner of the page.

Slip Op. 00-27

UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

LUXURY INTERNATIONAL, INC.,

Plaintiff,

v.

Court No. 99-02-00093

UNITED STATES; RAYMOND KELLY,
COMMISSIONER OF CUSTOMS;
IRENE JANKOV, PORT DIRECTOR,
LOS ANGELES CUSTOMS DISTRICT,
UNITED STATES CUSTOMS SERVICE,

Defendants,

and

ZAO ELORG and THE TETRIS COMPANY,
LLC,

Defendant-Intervenors.

Plaintiff, Luxury International, Inc. ("Luxury"), seeks an order: (1) compelling the United States Customs Service ("Customs") to release its LCD hand-held video games ("LCD games") from detention; and (2) requiring Customs to deliver to it the security posted by the defendant-intervenors, ZAO Elorg ("Elorg") and The Tetris Company, LLC ("Tetris"). Luxury contends that Customs' remand determination finding that its LCD games infringed on Elorg/Tetris' copyright was erroneous and that, therefore, the continued detention of the LCD games and the security is unlawful. Defendant-intervenors, on the other hand, request that the Court: (1) affirm Customs' remand determination; (2) instruct Customs to seize the LCD games; (3) order Customs to return the security to them; and (4) grant their motion to dismiss.

Held: Customs' remand determination is affirmed. Luxury's request for an order compelling Customs to release its LCD games and to deliver the security to it is denied. Elorg/Tetris' request for an order compelling Customs to seize the LCD games and return the security to them is granted. Elorg/Tetris' motion to dismiss is granted.

FROM

(FRI) 3.17'00 18:01/ST. 18:00/NO. 4860102434 P 4

Court No. 99-02-00093

Page 2

Dated: March 17, 2000

Law Offices of Elon A. Pollack (Elon A. Pollack and Eugene P. Sands) for plaintiff.

David W. Ogden, Acting Assistant Attorney General; Joseph I. Liebman, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (Saul Davis); of counsel: Yelena Slepak, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, for defendants.

Leboeuf, Lamb, Greene & MacRae, L.L.P. (Melvin S. Schwechter, David P. Sanders and Julie A. Coletti) for defendant-intervenors.

OPINION

TSOUCALAS, Senior Judge: Plaintiff, Luxury International, Inc. ("Luxury"), seeks an order: (1) compelling the United States Customs Service ("Customs") to release its LCD hand-held video games ("LCD games") from detention; and (2) requiring Customs to deliver to it the security posted by the defendant-intervenors, ZAO Elorg ("Elorg") and The Tetris Company, LLC ("Tetris"). Luxury contends that Customs' remand determination finding that its LCD games infringed on Elorg/Tetris' copyright was erroneous and that, therefore, the continued detention of the LCD games and the security is unlawful. Defendant-intervenors, on the other hand, request that the Court: (1) affirm Customs' remand determination; (2) instruct Customs to seize the LCD games; (3) order Customs to return the security to them; and (4) grant their motion to dismiss.

FROM

(FRI) 3.17' 00 18:02/ST. 18:00/NO. 4860102434 P 5

Court No. 99-02-00093

Page 3

BACKGROUND

On February 19, 1999, Luxury brought an action in this Court contesting Customs' denial of its protest, challenging the continued detention of its LCD games.¹ The Court determined that while it could properly exercise jurisdiction over Customs' denial of Luxury's protest under 28 U.S.C. § 1581(a) (1994), Luxury had prematurely commenced the action in the Court and had effectively circumvented the administrative process by which Customs would have ultimately issued a determination on whether the LCD games infringed on Elorg/Tetris' copyright. On September 23, 1999, the Court issued an order remanding the matter to Customs to decide the issues pertaining to copyright infringement pursuant to 28 U.S.C. § 2643(c)(1) (1994).

On November 17, 1999, the Court conducted a telephone conference and heard arguments by the parties with regard to Luxury's application for an injunction. On November 18, 1999, this Court issued an injunction prohibiting the Commissioner of Customs, Raymond Kelly, and the Port Director of the Los Angeles Customs District, Irene Jankov, from releasing any funds or other security until the Court reached a decision pertaining to copyright infringement and Customs' detention of the merchandise. On

¹ The facts surrounding this action are detailed in this Court's previous opinion and familiarity with them is presumed. See Luxury Int'l. Inc. v. United States, 23 CIT ___, 69 F. Supp. 2d 1364 (1999).

FROM

(FRI) 3.17' 00 18:02/ST. 18:00/NO. 4860102434 P 6

Court No. 99-02-00093

Page 4

November 22, 1999, the Court issued an order prohibiting Customs from instituting seizure proceedings pending resolution of the case or until the Court granted permission to commence seizure proceedings, and further decreed that the failure of Customs to institute seizure proceedings after the finding of infringement by Customs would not constitute a breach or violation of any Customs regulation.

JURISDICTION

The Court retains jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a) (1994), which provides the Court "shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." Section 515 of the Tariff Act, 19 U.S.C. § 1515 (1994 & Supp. III 1997), details the process by which Customs modifies and performs administrative review of its decisions and "provides for the allowance or denial of a protest filed pursuant to section 514 of the Tariff Act of 1930." Iowa, Ltd. v. United States, 5 CIT 81, 84, 561 F. Supp. 441, 444 (1983) (citation omitted).

FROM

(FRI) 3.17' 00 18:02/ST. 18:00/NO. 4860102434 P. 7

Court No. 99-02-00093

Page 5

DISCUSSION**I. Entitlement to Protect Copyright**

Elorg licenses the intellectual property in its trademarks and copyright registrations to various entities, including Nintendo of America, Inc. ("Nintendo"). See Ex. in Supp. of Luxury's Resp. Re Infringement ("Luxury's Ex.") O at 1. Nintendo is the copyright claimant for the copyright at issue, PAU 1,284,318 ("Copyright"), and recorded it with Customs under Customs Recordation No. 89-170. See id. at 4. The Copyright is based on four underlying copyrights: Copyright Registration Nos. PA 412,170; PA 1,214,036; PA 1,214,035; and PA 412,169. See id. The four underlying copyright registrations are held by Elorg and cover the underlying computer code and the audio-visual aspects of the Tetris game. See id. In the Copyright's registration, Nintendo identifies it as a derivative work based on Elorg's PA 412,170 and describes the additional material as some "[n]ew music and background sounds; some new visual display; [and the] computer program" that enables the Tetris game to be played on Nintendo's NES system. Luxury's Ex. D at 2.

Luxury claims that neither Elorg nor Tetris was identified as the owner of the Copyright, that neither recorded the Copyright for import protection and that, therefore, neither entity was entitled to file a demand for exclusion, post a bond or participate in the administrative proceedings. See Luxury's Response Re Infringement

FROM

(FRI) 3.17'00 18:02/ST. 18:00/NO. 4860102434 P 8

Court No. 99-02-00093

Page 6

("Luxury's Response") at 2-3. Luxury claims that only Nintendo of America, Inc. ("Nintendo") is entitled to perform those actions because it was the entity who filed the Copyright with the Copyright Office and recorded it with Customs for import protection. See id. at 3.

Section 133.31 of part 19 of the Code of Federal Regulations provides that "[c]laims to copyright which have been registered in accordance with the Copyright Act . . . may be recorded with Customs for import protection." 19 C.F.R. § 133.31(a) (1998). Section 133.31 further provides that the entity eligible to record for import protection is the "copyright owner, including any person who has acquired copyright ownership through an exclusive license, assignment, or otherwise, and claims actual or potential injury . . ." 19 C.F.R. § 133.31(b).

In this case, a dispute arises because the party who recorded the Copyright for import protection, Nintendo, was not the same party who took the measures outlined in 19 C.F.R. § 133.43 (1998) to protect the Copyright; Elorg and Tetris took steps to protect the Copyright. The regulations, however, do not state that only the copyright owner who recorded for protection is permitted to file a written demand, post a bond and participate in the administrative proceedings. See 19 C.F.R. § 133.43. The Customs regulations simply provide that imported articles detained on

FROM

(FRI) 3.17' 00 18:03/ST. 18:00/NO. 4860102434 P 9

Court No. 99-02-00093

Page 7

suspicion that they are infringing "will be released to the importer unless . . . the copyright owner files . . . a written demand for the exclusion from entry . . . [and a] bond" within specified time limits. 19 C.F.R. § 133.43(b)(6). The regulations also provide that the "copyright owner" has the right to participate in the administrative proceedings for the disputed claim of infringement. 19 C.F.R. § 133.43(d)(1). The regulations do not require that the copyright owner who recorded the copyright be the same copyright owner to protect the copyright. Thus, the failure of Elorg and Tetris to record the Copyright will not prevent them from enforcing their rights if they can properly be considered copyright owners.

The term "[c]opyright owner," with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right." 19 C.F.R. § 133.31(b). It includes "any person who has acquired copyright ownership through an exclusive license, assignment, or otherwise, and claims actual or potential injury" Id. It cannot be disputed that Elorg is a copyright owner within the meaning of the regulations. The Copyright is registered under the name of Nintendo, who is a licensee of Elorg.² The Copyright registration, however, states

² Nintendo of America, Inc. and its parent, Nintendo Co., Ltd., were the exclusive worldwide licensees of Elorg for the versions of the Tetris game until 1996, after which they became the non-exclusive sub-licensee of The Tetris Company, LLC. See Def.-

FROM (FRI) 3.17' 00 18:03/ST. 18:00/NO. 4860102434 P 10

Court No. 99-02-00093

Page 8

that an earlier version of the Copyright, namely, PA 412,170, has already been registered. See Luxury's Ex. D at 2. PA 412,170 is owned by Elorg and encompasses most of the intellectual property which forms the basis of the Copyright. In fact, the Copyright differs from Elorg's PA 412,170 only in some "'new music and background sounds; some new visual display, [and the] computer program' that allows the TETRIS game to be played on Nintendo's NES home-entertainment system." Luxury's Ex. O at 4. Thus, Elorg is properly considered a copyright owner by virtue of its ownership of the intellectual property upon which the Copyright is based.

Similarly, Tetris is a copyright owner under the regulations because it has held Elorg's exclusive rights to license the Tetris game to third parties in both the United States and other countries worldwide since 1996. See Def.-Intervenors' Rebuttal to Luxury's Resp. Re Infringement, Ex. A ¶3 and Ex. B ¶3.

Furthermore, distinguishing between the copyright owner who records for import protection and the copyright owner who acts to protect its copyright makes little sense in this case. The purpose of § 133.43 is to provide notice to persons claiming an interest in a copyright of a potentially infringing importation so that they can defend the copyright. See 17 U.S.C. § 602(b) (1994); 19 C.F.R.

Intervenors' Rebuttal to Luxury's Resp. Re Infringement, Ex. A ¶3 and Ex. B ¶3.

FROM

(FRI) 3.17' 00 18:03/ST. 18:00/NO. 4860102434 P 11

Court No. 99-02-00093

Page 9

§ 133.43. That purpose was served here when Customs notified Nintendo of the nature of Luxury's goods and Nintendo notified Tetris, the holder of the exclusive rights to license the Tetris game, and Elorg, the holder of the underlying copyrights upon which the Copyright was based.

In sum, because Elorg owns the rights at issue and Tetris is the exclusive licensee, both entities fall within the meaning of "copyright owner" as defined by 19 C.F.R. § 133.31. Because the regulations do not require that the copyright owner who recorded the copyright be the same copyright owner to protect the copyright, and because Elorg and Tetris are copyright owners, Elorg and Tetris were entitled to take the steps provided in Customs regulations to keep Luxury's merchandise from entering the United States stream of commerce.

II. Timeliness of Demand for Exclusion and Posting of Bond

Having found that Elorg and Tetris were entitled to file a demand for exclusion, post a bond and participate in the administrative proceedings, the Court proceeds to the issue of whether Tetris' demand for exclusion and posting of the bond were timely.

According to 19 C.F.R. § 133.43(b)(6), one who claims that his copyright is being infringed upon must make a "written demand for

FROM

(FRI) 3.17' 00 18:04/ST. 18:00/NO. 4860102434 P 12

Court No. 99-02-00093

Page 10

the exclusion from entry of the detained imported article" and also post a bond "conditioned to hold the importer or owner of the imported article harmless from any loss or damage resulting from Customs detention in the event the Commissioner or his designee determines that the article is not an infringing copy." 19 C.F.R. 133.43(b) (6) (1998). The written demand and bond must be filed with the port director within 30 days of Customs' notice that the imported articles will be released to the importer unless such action is taken. See id.

Luxury's position is that Elorg and Tetris did not file a timely demand for exclusion nor post a timely bond. See Luxury's Resp. at 14. Luxury maintains that the copyright owner had until October 4, 1998, 30 days from the date of Customs' September 4, 1998 notice of detention, to file a written demand for exclusion of the LCD games and to post a bond. See Luxury's Compl. at 3. Elorg and Tetris, on the other hand, contend that because October 4, 1998 was a Sunday, they had until October 5, 1998 to file a written demand for exclusion and to post a bond. See Def.-Intervenors Mot. To Dismiss ("Mot. to Dismiss") at 9.

Tetris alleges that on October 5, 1998, it attempted to post the bond by tendering \$150,000 in cash to Customs, which Customs refused to accept. See id. On October 6, 1998, however, Customs indicated that it would accept cash and accepted it. Elorg and

FROM

(FRI) 3.17' 00 18:04/ST. 18:00/NO. 4860102434 P 13

Court No. 99-02-00093

Page 11

Tetris argue that Customs' error in not accepting the permissible cash security in lieu of a bond caused the delay in complying with the regulations and that they should not suffer the consequences of Customs' mistake. See id. at 11.

The court takes judicial notice of the fact that October 4, 1998 was a Sunday. See Fed. R. Evid. 201(b); Norman G. Jensen, Inc. v. United States, 33 Cust. Ct. 377, 1954 WL 7344 (1954). Because October 4, 1998 was a Sunday, Tetris had until October 5, 1998 to file a written demand for exclusion and to post a bond. See Armstrong v. Tisch, 835 F.2d 1139 (5th Cir. 1988) (citing Street v. United States, 133 U.S. 299 (1890)) (holding that when last day of federal regulation fell on weekend or holiday, time limit was extended until end of next business day). Because Tetris' written demand for exclusion was delivered to Customs on October 5, 1998, it was timely.

Tetris also posted a timely bond as required by law. Tetris tendered a timely check on October 5, 1998, but Customs refused to accept a cash payment. Customs was in error in not accepting the cash, as the regulations provide that cash may be posted in lieu of a bond. See 19 C.F.R. §113.40 (1998) ("In lieu of sureties on any bond required or authorized by any law, regulation, or instruction[,] . . . the port director is authorized to accept United States money . . . in an amount equal to the amount of the

FROM

(FRI) 3.17' 00 18:04/ST. 18:00/NO. 4860102434 P 14

Court No. 99-02-00093

Page 12

bond."). Tetris fulfilled its obligation under 19 C.F.R. § 133.43(b)(6) and there is no reason why Tetris should be penalized for Customs' error. Customs was correct in denying Luxury's protest of its decision to continue to detain the games because the written demand for exclusion and the posting of the bond were timely.

III. Customs' Determination of Infringement

Luxury had refused to participate in the proceedings commenced by Customs to determine whether the LCD games infringe on Elorg/Tetris' copyright. Instead of waiting for Customs' determination on the issue of infringement, Luxury commenced this action contesting the denial of its protest. Luxury's filing of the action contesting Customs' denial of its protest was premature and circumvented the proper course of Customs' administrative procedure.

The Court, therefore, remanded the matter to Customs in order to allow the administrative process to resume its normal course, that is, to allow Customs to determine whether Luxury's LCD games infringed on the copyright of Elorg/Tetris. Specifically, the Court ordered Customs to "determine administratively whether there is infringement of ZAO's copyright." Luxury, 23 CIT at ___, 69 F. Supp. 2d at 1370.

FROM

(FRI) 3.17' 00 18:04/ST. 18:00/NO. 4860102434 P 15

Court No. 99-02-00093

Page 13

Customs complied with the Court's order to make a determination as to infringement, which resulted in Customs finding that Luxury's LCD games infringed on the Copyright. See Mem. to Director, Los Angeles/Long Beach Support from Acting Chief, IPR Branch (Nov. 4, 1999). Customs acted properly pursuant to its power to make determinations concerning copyright infringement while fulfilling its duty to prohibit importation of infringing merchandise. See Miss America Org. v. Mattel, Inc., 945 F.2d 536, 538-39 (2d Cir. 1991).

The proper procedure upon Customs finding an infringement mandates that "the port director shall seize the imported article" and return the bond to the copyright owner. 19 C.F.R. § 133.44(a) (1998). Accordingly, the port director must seize the LCD games and return the bond to Tetris.

FROM (FRI) 3.17' 00 18:05/ST. 18:00/NO. 4860102434 P 16

Court No. 99-02-00093

Page 14

CONCLUSION

Since Customs has decided that Luxury's LCD games infringe on the copyright of Elorg and Tetris, the Court orders that Customs seize the LCD games and return the bond to Tetris. This case is dismissed.

Nicholas Tsoucalas
NICHOLAS TSOUCALAS
SENIOR JUDGE

Dated: March 17, 2000
New York, New York

FROM

(FRI) 3.17' 00 18:05/ST. 18:00/NO. 4860102434 P 17

UNITED STATES COURT OF INTERNATIONAL TRADE

Slip Op. 00-27

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

LUXURY INTERNATIONAL, INC., :
Plaintiff, :
v. : Court No. 99-02-00093
UNITED STATES; RAYMOND KELLY, :
COMMISSIONER OF CUSTOMS; :
IRENE JANKOV, PORT DIRECTOR, :
LOS ANGELES CUSTOMS DISTRICT, :
UNITED STATES CUSTOMS SERVICE, :
Defendants, :
and :
ZAO ELORG and THE TETRIS COMPANY, :
LLC, :
Defendant-Intervenors. :
:

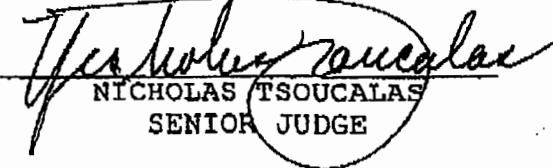
JUDGMENT

This case, having been duly submitted for decision, and the Court, after due deliberation, having rendered a decision herein, now, in accordance with said decision, it is hereby

ORDERED that the United States Customs Service ("Customs") seize the LCD hand-held video games; and it is further

ORDERED that Customs return the security posted by the defendant-intervenor, The Tetris Company, LLC; and it is further

ORDERED that this case is dismissed.



NICHOLAS TSOUCALAS
SENIOR JUDGE

Dated: March 17, 2000
New York, New York

NOV. -22' 99 (MON) 10:27 US CUSTOMS/S&P

TEL: 3105146830

P. 003

Memorandum

UNITED STATES GOVERNMENT
DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE



Date: November 4, 1999

RR:IT:IP
467175 GFM

TO: Director, Los Angeles/Long Beach Seaport

FROM: Acting Chief, IPR Branch

RE: "TETRIS" (U.S. Copyright Office Registration No. PAu 1,284,318, U.S. Customs Service Recordation No. COP89-00202), held by Nintendo of America, Inc.; ZAO Elorg; Luxury International, Inc.; Violative status of 22,000 pieces of imported "brick" games; ISET Case No. 98-0249; Entry No. G51-01725358.

This is in regard to your referral of December 24, 1998, forwarding for our review the above-referenced case file for administration.

Subsequent to the receipt of your referral, the importer (Luxury International, Inc.) commenced an action against U.S. Customs in the Court of International Trade based upon alleged procedural irregularities incident to the detention and adversarial process undertaken pursuant to Title 19, Customs Regulations, Section 133.43. On September 23, 1999, the Court remanded the case to U.S. Customs Headquarters for a determination relative to the substantive copyright infringement elements of this case. Our determination follows:

The subject case involves the importation of 22,000 LCD hand-held electronic game pieces which were detained under 19 CFR § 133.43 as constituting "possibly piratical" copies of the above-referenced "TETRIS" copyright. In accordance with procedures under 19 CFR. § 133.43, Customs detained the shipment, the importer denied the allegations, and both the importer and copyright owner were afforded opportunities to provide input to Customs supporting their respective contentions. Although the copyright holder did submit supporting briefs and evidence supporting its substantive contentions to Customs, we note that the importer did not.

NOV. -22' 99 (MON) 10:27 US CUSTOMS/S&P

TEL:3105146830

P. 004

- 2 -

The role of Customs in issuing substantive decisions of copyright infringement as to imported merchandise was addressed in *The Miss America Organization v. Mattel, Inc.*, 945 F.2d 536 (2d Cir. 1991). Citing section 603 of the Copyright Act of 1976 (17 U.S.C. § 603), the court recognized Customs authority to enforce the provisions of the law prohibiting importations of infringing goods. *Id.* at 538. Also, the court acknowledged that as a result of its duties, Customs has developed expertise in determining whether merchandise does or does not infringe. *Id.* at 539. Further, the court stated that since sections 602 and 603 (17 U.S.C. §§ 602, 603) direct the Secretary of Treasury to enact regulations to aid in combating copyright infringement, it is implicit in these directions that the agency (Customs) would be involved in making infringement determinations. *Id.* at 541. Therefore, because the Treasury Department has been assigned the duty to enforce the copyright laws in cases where there is a reason to believe infringement exists with regard to an imported item, it follows that it is within Customs jurisdiction to take appropriate action to fulfill this duty. *Id.* at 542.

Further, Customs has some independence and autonomy in making infringement determinations regarding imported merchandise. *Id.* at 544. Accordingly, as the court stated, there is no reason to enjoin Customs from performing its statutory duties so long as the agency proceeds in conformity with the statutory scheme. *Id.*

In such cases, under Customs regulations, the copyright owner bears the burden of proving copyright infringement. 19 CFR § 133.43(c)(1). In order to prove copyright infringement, the copyright owner must show: (1) ownership of a valid copyright; and (2) copying by the creator of the imported work. *Act Young Imports, Inc. v. B and E Sales Co., Inc.*, 673 F. Supp. 672, 673 (S.D.N.Y. 1987). "Copying" can be established by showing that: (1) the claimed infringer had access to the copyright owner's work, and (2) the protected elements of the two works are substantially similar. *Levine v. McDonald's Corp.*, 735 F. Supp. 92, 95 (S.D.N.Y. 1990); *see also*, 3 M. Nimmer, *Nimmer On Copyright* § 13.01, at 13-3 (1981) ("Nimmer").

Regarding ownership of a valid copyright, section 410(c) of the Copyright Act of 1976, as amended, states that "the certificate of a registration made before or within five years after first publication of the work shall constitute *prima facie* evidence of the validity of the copyright and of the facts stated in the certificate." 17 U.S.C. § 410(c). In the present case, a valid copyright registration covering the subject copyrighted work exists.

Regarding access to the copyright owner's work, access is presumed where an item is generally available on the open market. *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946); *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090, 1092 (2d Cir. 1977). In the present case, the worldwide availability of the subject copyrighted work sufficiently establishes access.

NOV. -22' 99 (MON) 10:27 US CUSTOMS/S&P

TEL: 3105146830

P. 005

- 3 -

As in most cases of copyright infringement, however, the determination rests upon whether the works are "substantially similar." With regard to the issue of substantial similarity, courts often look to the two-part test for similarity as outlined in *Sid & Marty Kroft Television v. McDonald's Corp.*, 562 F.2d 1157, 1162 (9th Cir. 1977). In that case, the Ninth Circuit adopted a two-part test. The first step, labeled the "extrinsic test", requires a determination of substantial similarity between the ideas which includes an analysis of the type of artwork at issue, the materials used, the subject matter at issue, and the setting for that subject matter. The second step, labeled the "intrinsic test", involves a determination of substantial similarity between the ideas which depends not on expert testimony or analytic dissection, but instead on the response of the ordinary lay person. That is, the determination focuses largely on whether the suspect work captures the "total concept and feel" of the copyrighted work. See, *Spectravest v. Mervyn's, Inc.*, 673 F. Supp. 1486, 6 U.S.P.Q. 2d 1135, 1138 (N.D. Cal. 1987); *Baxter v. MCA Inc.*, 812 F.2d 421, 424 (9th Cir. 1987).

With regard to the matter now before us, as regards the "extrinsic test" for similarity, it can clearly be established that the two items involve the same subject matter: hand-held electronic game devices containing LCD falling "brick" games.

As regards the "intrinsic test" for similarity, we note that it is not improper to engage in a side-by-side comparison of the designs in order to reach a determination on the issue of substantial similarity. *Knickerbocker Toy Co., Inc. v. Genie Toys, Inc.*, 491 F. Supp. 526, 528 (E.D. Mo. 1980). "Substantial similarity" is defined as a showing that the ordinary observer, not set out to detect the differences between two works, would be disposed to overlook the differences and regard the aesthetic appeal of the two works to be the same. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960); *In re "Rock 'n Flowers"*, C.S.D. 90-67, 24 Cust. B. & Dec. No. 23 (March 21, 1990). "Substantial similarity" is also defined as whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work. *Ideal Toy Corp. v. Fab-Lu Ltd. (Inc.)*, 360 F.2d 1021, 1022 (2d Cir. 1966); *Durham Industries, Inc. v. Tomy Corporation*, 630 F.2d 905, 912 (2d Cir. 1980).

In a case similar to the one at hand involving video game copyright infringement, *Atari, Inc. et. al. v. North American Phillips Consumer Electronics Corp., et. al.*, 214 U.S.P.Q. 33 (CA 7 1982) (hereinafter, *Philips*), the U.S. Circuit Court of Appeals for the Seventh Circuit ruled that overwhelming similarities inherent in the features of two video works, PAC-MAN and K.C. Munchkin, warranted a finding of infringement. In its decision, the court noted that the defendant not only adopted the same basic characters, but also portrayed them in a manner which made its game appear substantially similar to the protected work. As in the present case, numerous similarities, such as the relative size and shape of the characters' "bodies," the V-shaped "mouths," distinctive gobbling actions (with related appropriate sounds), the ways in which they disappeared upon being captured, similar peculiar "eye" and "leg" movements, and the role reversal and "regeneration" process present in both games were so similar that an ordinary observer could only conclude that the defendant copied the plaintiff's work.

- 4 -

The defendant in *Philips* pointed to a laundry list of specific differences. In response, the court noted that although numerous differences may influence the impressions of the ordinary observer, "slight differences between a protected work and an accused work will not preclude a finding of infringement" where the works are substantially similar in other respects. *Id.* at 42; citing *Durham Industries, Inc. v. Tomy Corp.*, 630 F2d 905, 913; see *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir.), cert. denied, 298 U.S. 669, 56 S. Ct. 835, 80 L. Ed. 1392 (1936). The Court further stated that "exact reproduction or near identity is not necessary to establish infringement. An infringement...includes also the various modes in which the matter of any work may be adopted, imitated, transferred, or reproduced, with more or less colorable alterations to disguise the piracy." *Id.*

In overturning the lower district court decision, the court in *Philips* noted that the lower court "focused on certain differences in detail and seemingly ignored (or at least failed to articulate) the more obvious similarities." *Id.* at 42. It further stated that "the sine qua non of the ordinary observer test, however, is the overall similarities rather than the minute differences between the two works." *Id.*, citing *Peter Pan Fabrics*, 274 F.2d at 489.

Also, importantly, the court noted that "in order to assess the impact of certain differences, one factor to consider is the nature of the protected material and the setting in which it appears. *Philips* at 42. The Court continued:

Video games, unlike an artist's painting or even other audiovisual works, appeal to an audience that is fairly undiscriminating insofar as their concern about more subtle differences in artistic expression. The main attraction of [such] games lies in the stimulation provided by the intensity of the competition. A person who is entranced by the play of the game "would be disposed to overlook" many of the minor differences in detail and "regard their aesthetic appeal as the same." *Id.* at 43 (citing *Kroft, supra* at 1166-67. [children would view accused characters as substantially similar to the protected characters despite differences in detail]).

As in the *Philips* case, the case under consideration herein presents with numerous similarities. In the present case, the copyrightable features of the TETRIS game, as covered by the copyright registration, includes the downward, lateral, and rotating movements of the differently oriented four-brick playing pieces, and the shape and appearance of the four-brick playing pieces, both in the "dots" that appear within the individual bricks themselves, as well as in the configuration of the four-brick combinations comprising the playing pieces. Additional copyrighted features include: the scoring features, the feature displaying the next four-brick playing piece that will fall down the playing field matrix, the disappearance of any completed horizontal row, the subsequent consolidation of the playing pieces remaining on the playing field

NOV. -22' 99 (MON) 10:28 US CUSTOMS/S&P

TEL: 3105146830

P. 007

- 5 -

as a result of the downward shift into the space vacated by the disappearing row, the resulting score, the background music, the specific sounds generated as the four-brick playing pieces are rotated, and the sounds generated as a row is completed and points are earned. Further, the makeup of the playing field itself, i.e., the vertical matrix, higher than it is wide, with a base of ten individual "bricks" per horizontal row, and generally twenty individual "bricks" per vertical line, is also copyrightable expression.

The imported "brick games" utilize the same individual brick shapes, the same four-brick configuration playing pieces, the same rotating, lateral, and downward movements of the playing pieces, and the same sequential configuration of the various shapes of the four-brick playing pieces. The "brick games" also use the same depiction of the next playing piece that will fall down the playing field matrix, and also uses an almost identical playing field matrix design in the height, width and layout, to that of the TETRIS game. Other similar elements include the background music, the scoring elements, the disappearing completed rows and the subsequent consolidation of the remaining incomplete rows left below, the accompanying sounds to the rotating, lateral and downward movements of the playing pieces, and the sounds that occur upon completion of a row and the earning of points. Like TETRIS, the "brick game" also ends when the playing field matrix is "filled up" with incomplete horizontal rows left on the playing field.

The evidence clearly shows that "brick games" contained in the detained shipment present with numerous features similar to those contained in the copyrighted TETRIS work. The presence of these copyrightable features leads us to conclude that the imported games constitute substantially similar copies of the protected works and that the goods are properly considered piratical.

In reaching this determination, although provided with no supporting briefs or evidence by the importer, we have taken care to research and consider related relevant cases. One such case, *Atari, Inc. v. Amusement World, Inc., et.al.*, 547 F.Supp 222 (Dist. Ct. Maryland) (hereinafter *Amusement World*) decided nearly 20 years ago presents similar, yet distinguishable issues. In that case, the District Court for the District of Maryland, in the face of some 22 material similarities, declined to find infringement. The court, believing that the idea/expression dichotomy could not be kept separate, reasoned that the numerous similarities were:

"inevitable, given the requirements of the idea of a game involving a spaceship combating space rocks and given the technical demands of the medium of a video game. There are certain forms of expression that one must necessarily use in designing a video game in which a player fights his way through space rocks and enemy spaceships. The player must be able to rotate and move his craft. All the spaceships must be able to fire weapons which can destroy targets. The game must be easy at first and gradually get harder, so that bad players are not frustrated and good ones are challenged. Therefore, the rocks must move faster as the game progresses. In order for the game to look at all realistic, there must be more than one

NOV. -22' 99 (MON) 10:29 US CUSTOMS/S&P

TEL:3105146830

P. 008

- 6 -

size of rock. Rocks cannot split into very many pieces, or else the screen would quickly become filled with rocks and the player would lose too quickly. All video games have characteristic sounds and symbols designed to increase the sensation of action. The player must be awarded points for destroying objects, based on the degree of difficulty involved.

All these requirements of a video game in which the player combats space rocks and spaceships combine to dictate certain forms of expression that must appear in any version of such a game. In fact, these requirements account for most of the similarities between "Meteors" and "Asteroids." Similarities so accounted for do not constitute copyright infringement, because they are part of plaintiff's idea and are not protected by plaintiff's copyright. *Id.* at 229. (Emphasis added).

We are decidedly not as inclined as the District Court of Maryland was to limit the horizons of intellectual creativity so as to describe such similarities as "inevitable." Nor are we inclined to agree with the Court's pronouncement that the enumerated features of the works considered in *Amusement World* were "forms of expression which must appear in 'any version' of such a game." While such a conclusion may have seemed plausible to some in 1982, considering the quantum leap in the advancement of digital graphic technology that has taken place since, such notions now seem unsupported by reality. Given current technological capabilities alone, it has become clear that the boundaries of expression which may have seemed fixed in the past have significantly expanded in recent times--so much so as to enable creators to overcome once seemingly insurmountable technical demands, severing unintended and undesired bonds of idea and expression.

In contrasting the *Amusement World* case to the case at bar, we would first state that many other video games involve the use of square blocks on a screen in various configurations that can be manipulated by the player and that interact to score points. *See Atari Games Corp. v. Oman*, 24 U.S.P.Q. 2d 1993 (D.C. Cir. 1992) (relating to copyright registerability of BREAKOUT game). The "idea" of using simple squares or blocks on the screen to be assembled into specific shapes and manipulated by the player in a race against time or against the computer is not protectable as such. The Court in *Atari v. Oman* found the synergistic selection and arrangement of elements in a video game that (individually) may not qualify for copyright to exceed the "minimal degree of creativity" needed to bring the work within the protection of the copyright laws. *Id.* at 1936; *see Feist Publications v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282, 1289 (1991). Other games, including others contained within the imported games that do not infringe the TETRIS copyright, express the idea of using manipulable and interacting square blocks to form, among other things, race cars that move along a track and around barricades, tanks that rotate and shoot at each other or at barricades, Ping-Pong, and "bombing" or "drop" games, as well as the BREAKOUT game discussed in *Atari v. Oman*, *supra*. Each of these examples clearly includes protectable expression based on the same underlying idea but does not include the expression of the TETRIS game.

NOV. - 22' 99 (MON) 10:30 US CUSTOMS/S&P

TEL: 3105146830

P. 009

- 7 -

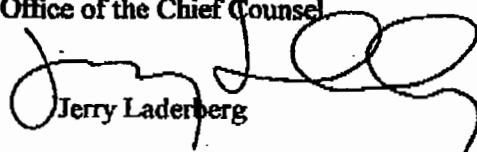
As distinguished from other games which may have real life, or at least science fiction, counterparts, *Amusement World*, *supra*, and *Data East USA, Inc. v. Epyx, Inc.*, 9 U.S.P.Q. 2d 1332 (9th Cir. 1988) (scene-a-faire video game featuring common depictions of Karate fighting), the TETRIS game's expression of the manipulable block configuration idea is a wholly fanciful creation, without reference to the real world. *Philips*, *supra* at 42. The nature of the protected material and the setting in which it appears is an important factor when comparing games in an infringement analysis. *Id.* An abstract representation is "neither an 'obvious' nor an 'inevitable' choice." *Atari v. Oman*, 24 U.S.P.Q. 2d at 1937.

While the court in *Amusement World* gave a very narrow scope of protection to the ASTEROIDS game, the court did not find that the video game lacked any protectable expression. Instead, it found that the defendant had taken only the "idea" of the game and expressed it in a different way. It found that the "overall 'feel' of the way the games play is different." *Id.* at 230. Conversely, in the instant case, the overall "feel" of the games is identical.

The *Amusement World* court recognized protectable expression in the "design features" of the ASTEROIDS game. These included "the symbols that appear on the display screen, the ways in which those symbols move around the display screen, and the sounds emanating from the game cabinet." *Id.* at 227. The court there found that the defendants used "symbols, movements, and sounds that are different from those used in plaintiff's game." *Id.* In the instant case, as clearly shown in the videotaped side-by-side comparison supplied by the copyright owner with its brief, the imported game not only adopted the entire set of game pieces and scoring scheme of the TETRIS game, it copied nearly the entire presentation. These include the size and shape (ten blocks wide by twenty blocks high) of the playing field; the number, shape and appearance (dot inside of each square) of each game piece; the depiction along the sidelines of the next piece to appear; the scoring; and the use of very similar sounds corresponding to movements and scoring, as well as background and introductory music.

As stated, the evidence clearly shows that the "brick games" contained in the detained shipment copy several original copyrighted features of the protected TETRIS work. The imported games constitute piratical copies of the subject protected works.

As this matter is currently under the jurisdiction of the Court of International Trade, we are not recommending that the subject goods be seized at this time. In remanding this matter to Customs, Judge Tsoucalas of the Court ordered Customs to "decide the issues pertaining to copyright infringement"; the court made no mention of taking the additional enforcement action of seizure with respect to this case which under its jurisdiction. You will be advised later as to further action by either our office or the Office of the Chief Counsel.



Jerry Laderberg